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No. 05-

IN THE

Supreme Court of the United States

AIR CONDITIONING & REFRIGERATION INSTITUTE *et al.*,
Petitioners,

v.

ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Since 1975, Congress has enacted a series of energy statutes that regulate efficiency standards, testing, information disclosure and labeling. Those same statutes contain express preemption provisions. See 42 U.S.C. §§ 6297(a), 6316. The question presented is:

Whether the Ninth Circuit's crabbed interpretation of Congress's express preemption provisions conflicts with decisions of this Court and other courts of appeals by rewriting the federal statute in order to preserve state regulations, and thereby undermines the important federal interest in uniformity embodied in the federal statutes.

PARTIES TO THE PROCEEDINGS

In addition to the parties listed in the caption, the following were Plaintiffs-Appellees below and are Petitioners here:

Gas Appliance Manufacturers Association
Association of Home Appliance Manufacturers
National Electrical Manufacturers Association;

and the following were Defendants-Appellants below and are Respondents here:

William J. Keese, Chairman
Robert Pernell, Commissioner
Aurthur H. Rosenfeld, Commissioner
James D. Boyd, Commissioner
John L. Geesman, Commissioner

RULE 29.6 STATEMENT

Petitioners are industry membership organizations. None of the four entities has a parent corporation or issues stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Air-Conditioning and Refrigeration Institute, Gas Appliance Manufacturers Association, Association of Home Appliance Manufacturers, and National Electrical Manufacturers Association respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

JUDGMENT FOR WHICH REVIEW IS SOUGHT

The initial decision of the court of appeals is reported at 397 F.3d 755. That opinion was subsequently amended in an opinion that is reported at 410 F.3d 492, and reproduced in the Appendix to this Petition ("Pet. App.") at 1a-22a. The district court's order entering a permanent injunction is unreported, and is reproduced at Pet. App. 23a-44a.

JURISDICTION

The court of appeals entered its judgment on June 3, 2005, Pet. App. 1a, and denied rehearing and rehearing en banc that same day, *id.* at 45a-46a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). On August 4, 2005, Justice O'Connor extended the time for filing a petition to and including September 13, 2005.

STATUTES OR OTHER PROVISIONS INVOLVED

42 U.S.C. § 6297 provides in relevant part:

(a) Preemption of testing and labeling requirements

(1) Effective on March 17, 1987, this part supersedes any State regulation insofar as such State regulation provides at any time for the disclosure of information with respect to any measure of energy consumption or water use of any covered product if—

> (A) such State regulation requires testing or the use of any measure of energy consumption, water use, or energy descriptor in any manner other than that provided under section 6293 of this title; or
>
> (B) such State regulation requires disclosure of information with respect to the energy use, energy efficiency, or water use of any covered product other than information required under section 6294 of this title.

Section 6316 of title 42 of the United States Code, which incorporates § 6297 by reference, is reproduced at Pet. App. 47a-49a. California Code of Regulations title 20, §§ 1606-1608 are reproduced at Pet. App. 50a-83a.

STATEMENT

For the second time in less than three years, the Ninth Circuit has eviscerated an express preemption provision in an important federal statute by refusing to apply the statute's plain text. Cf. *Engine Mfrs. Ass'n* v. *South Coast Air Quality Mgmt. Dist.* ("*EMA*"), 541 U.S. 246 (2004), *vacating* 309 F.3d 550 (9th Cir. 2002). Since 1975, Congress has enacted a series of laws that regulate energy efficiency standards and mandate certain information disclosures and labeling requirements, and preempt state regulation pertaining to these subjects. Pursuant to these same statutes, the Department of Energy and the Federal Trade Commission have imposed a comprehensive program of federal regulations that require, among other things, that manufacturers disclose information about their products to the federal government, and that impose detailed labeling requirements (including, notably, the well-known, yellow EnergyGuide labels). The federal government also makes the information disclosed to it available to the public through a web site run by the Federal Trade Commission. Yet, despite these federal mandates, California imposes its own disclosure rules and its own labeling requirements which, if allowed to go into effect, will result in

substantial cost for manufacturers. Indeed, a product that does not meet the California requirements cannot be sold in that State.

In determining whether the federal statutes' express preemption provisions apply to California's regulatory requirements, the Ninth Circuit predicated its analysis—as it did in *EMA*—on its value-laden assertion that the state regulation is "laudable." Pet. App. 2a. Just as it did in *EMA*, the Ninth Circuit applied a "presumption against preemption" to narrow the statutory preemption clause, contrary to the statute's plain text and to decisions of this Court and other courts of appeals. And, just as it did in *EMA*, this mistaken analysis implicates a critical question of federal law.

The Ninth Circuit's decision upholding the California regulations thus throws open the door for every State to impose distinct and conflicting obligations on manufacturers, which is precisely what the federal preemption provisions were meant to prevent. Certiorari should be granted to resolve the multiple conflicts created by the decision below, and to return certainty and national uniformity to this important area of federal regulation.

I. STATUTORY BACKGROUND

1. Over the past three decades, Congress has enacted a series of statutes aimed at implementing a "comprehensive national energy policy." S. Conf. Rep. No. 94-516, at 116 (1975), *reprinted in* 1975 U.S.C.C.A.N. 1956, 1957. This effort began in 1975, in the wake of the then-just-ended oil embargo, when Congress enacted the Energy Policy and Conservation Act (EPCA).[1] That statute was subsequently amended in 1978 by the National Energy Conservation and Policy Act (NECPA),[2] and later followed by the National Ap-

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[1] Pub. L. No. 94-163, 89 Stat. 871 (1975) (codified as amended at 42 U.S.C. § 6291 *et seq.*).

[2] Pub. L. No. 95-619, 92 Stat. 3206 (1978).

pliance Energy Conservation Act of 1987 (NAECA)[3]; the Energy Policy Act of 1992 (EPAct)[4]; and just recently, the Energy Policy Act of 2005.[5]

One critical component of this national energy policy was the enactment of comprehensive legislation governing the energy efficiency of certain consumer products (such as refrigerators, air conditioners, washers, dryers, ovens and water heaters, see 42 U.S.C. § 6292(a)), and commercial and industrial equipment (such as electric motors and pumps, and commercial heating and air conditioning equipment, see *id.* § 6311(1)). To promote energy conservation, Congress imposed numerous, specific and wide-ranging requirements related to energy efficiency. These include, among other things, standards limiting the products' permissible energy use, *id.* §§ 6295, 6313; test procedures to evaluate their energy use, *id.* §§ 6293, 6314; labeling requirements, *id.* §§ 6294, 6315; and requirements regarding the submission of product information to the Department of Energy, *id.* § 6296(d). See S. Conf. Rep. No. 94-516, at 119, 1975 U.S.C.C.A.N. at 1960 ("[EPCA] would require test procedures for, and energy efficiency labeling of, major home appliances").

This statutory scheme, comprehensive on its own, is supplemented by even more involved federal regulations promulgated by the Department of Energy and the Federal Trade Commission. The Department of Energy specifies in detail the manner in which regulated products must be tested. See generally 10 C.F.R. pts. 430, 431; *e.g.*, 10 C.F.R. §§ 431.16-.18, 431.76, 431.86, 431.96. Both the Department of Energy and the Federal Trade Commission regulate the labeling of these products, see 42 U.S.C. §§ 6294, 6315; 16 C.F.R.

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[3] Pub. L. No. 100-12, 101 Stat. 103 (1987).

[4] Pub. L. No. 102-486, 106 Stat. 2776 (1992) (codified at 42 U.S.C. § 6311 *et seq.*).

[5] Pub. L. No. 109-58, 119 Stat. 594 (2005) (to be codified in scattered sections of titles 7, 15, 16, 25, 30, 41 and 42 of the United States Code).

§ 305.11-.12 & app.L; 10 C.F.R. § 431.30-.31, and impose requirements related to the submission of data to the federal government, see *e.g.*, 10 C.F.R. § 430.62, 431.36; 16 C.F.R. § 305.8, 305.11-.14. Moreover, the Federal Trade Commission makes available to the public, through a web site, information concerning the energy efficiency of many of the regulated products. See Federal Trade Comm'n, Appliance Energy Data, http://ftc.gov/bcp/conline/edcams/eande/appliances/index.htm (last visited Sept. 9, 2005).

These regulations are not only comprehensive, but extremely detailed. With regard to labeling, for instance, regulations specify not just the contents of the label, but the precise text, as well as the type font and size, the paper stock, and the placement of the label, among other things. 16 C.F.R. § 305.11 & app.L.

It is unsurprising, given Congress's goal of developing a "comprehensive" national energy policy—and the thorough statutory and regulatory regime that resulted—that, as part of these statutes, Congress enacted express preemption provisions. These provisions concern consumer appliances, see 42 U.S.C. § 6297, and industrial equipment, see *id.* § 6316.[6] They expressly preempt state energy standards and testing requirements. And, pertinent here, § 6297(a)(1) preempts "any State regulation [that] ... provides at any time for the disclosure of information with respect to any measure of energy consumption," so long as the State requires testing or information disclosure "other than" the federal requirements. *Id.* § 6297(a)(1).

These preemption requirements are an integral component of Congress's effort to promote energy conservation. The

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[6] Consumer appliances are referred to in the statute as "covered products," *see* 42 U.S.C. § 6297, and commercial and industrial equipment are designated as "covered equipment," *id.* § 6316(a)(3), 6311(1). Section 6316 incorporates § 6297 by reference, and the two provisions are identical in all respects relevant here. Accordingly, this brief discusses the two provisions in tandem.

1987 act (NAECA), for instance, had "two central tenets," one of which was that "the bill preempts state law under most circumstances." H.R. Rep. No. 100-11, at 19 (1987). NAECA's preemption provision was "designed to protect the appliance industry from having to comply with a patchwork of numerous conflicting State requirements," *id.* at 24. Indeed, NAECA reasserted federal control in light of a "growing plethora of differing state regulations," and Congress intended, through the imposition of "uniform standards," to "bring a degree of regulatory ... certainty to the business planning of the appliance manufacturing industry, which has had to grapple in recent years with a growing number of differing State appliance laws and regulations." *Id.* at 28.[7]

Congress placed two important limitations on the otherwise expansive scope of the statutes' preemption. *First*, recognizing that some States might face unique circumstances, it included a safety valve. A State that wishes to impose an "energy conservation standard or other requirement with respect to energy use, energy efficiency, or water use" may do so if it demonstrates "unusual and compelling State or local energy or water interests." 42 U.S.C. § 6297(d)(1)(A), (B). Thus, a State that has interests "substantially different in nature or magnitude than those prevailing in the United States generally," *id.* § 6297(d)(1)(C)(i), may be excused from the otherwise broad scope of preemption, if it makes the relevant showing to the Secretary of Energy, 10 C.F.R. § 430.40-.49. (Notably, however, even where this safety valve is concerned,

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[7] *Accord* S. Rep. No. 100-6, at 2 (1987), *reprinted in* 1987 U.S.C.C.A.N. at 52 (NAECA was meant "to reduce the regulatory and economic burdens on the appliance manufacturing industry"); *id.* at 4, 1987 U.S.C.C.A.N. at 54-55 (noting that under the existing state of the law, "appliance manufacturers were confronted with the problem of a growing patchwork of differing State regulations which would increasingly complicate their design, production and marketing plans. Regulations in a few populous States could as a practical matter determine the product lines sold nationwide, even in States where no regulations existed.").

national interests predominate. See 42 U.S.C. § 6297(d)(3)). *Second*, Congress expressly grandfathered in certain existing state requirements, see, *e.g.*, *id.* § 6297(c)(4), (5)—including provisions of the California Code of Regulations, see *id.* § 6316(b)(2)(C). Outside these circumstances, however, state law is broadly preempted.

2. At almost exactly the same time Congress enacted EPCA, the State of California undertook its own efforts to regulate energy policy generally, and energy efficiency specifically. In 1975 the California Legislature established the California Energy Commission (CEC),[8] Cal. Pub. Res. Code §§ 25200-25226, which, among other purposes, is tasked with studying "[i]mproved appliance efficiency," *id.* § 25401(d), and prescribing energy efficiency standards and labeling, *id.* § 25402(c)(1)-(2). CEC did not, however, regulate information disclosure until later.

At issue here are three regulations promulgated by CEC in 2002—namely, California Code of Regulations, title 20, §§ 1606-1608. Section 1606 directs manufacturers of numerous products (refrigerators, ice makers, air conditioners, ceiling fans, space heaters, lamps, and the like, see *id.* § 1606 tbl.V) to disclose detailed and voluminous information to CEC. The required information includes details about the manufacturer, see *id.* § 1606(a)(2), as well as identifying information about the product, such as the brand name and model number, *id.* § 1606 tbl.V. Furthermore, § 1606 requires the manufacturer to submit test results and test reports, the particulars of which are specified in minute detail, *id.* § 1606(a)(3)(A) (cross-referencing *id.* §§ 1603 and 1604, which specify test protocols), as is the manner in which these results must be reported, *id.* § 1606(a)(3)(E). The regulations further identify *several hundred* items of product-specific information that manufacturers must submit to CEC, many of

[8] "California Energy Commission" or "CEC" is the commonly used name for Respondent Energy Resources Conservation and Development Commission.

which relate to energy consumption.[9] These requirements are far more extensive than the federal government's disclosure requirements. For instance, manufacturers of residential gas furnaces must disclose only six or seven items of information to the federal government, see 16 C.F.R. § 305.8(a)(1), but they must disclose well over 20 pieces of information to CEC, see Cal. Code Regs. tit. 20, § 1606(a)(2) & tbl.V, at E; see also *id.* § 1606 tbl.V, at C (requiring manufacturers of residential air conditioners to disclose more than 20 pieces of information not required by federal regulation). This information is compiled by CEC into a database, *id.* § 1606(c), which is available to the public, see CEC, Appliance Efficiency and Appliance Regulations, http://www.energy.ca.gov/efficiency/appliances (last visited Sept. 9, 2005).

In addition to § 1606's information-disclosure requirements, § 1607 sets forth "marking" requirements—*i.e.*, labeling instructions. Specifically, the regulation requires that each appliance's name, model number and date of manufacture must be marked on the unit itself, Cal. Code Regs. tit. 20, § 1607(b) (with certain limited exceptions, *id.* § 1607(c)); that the products carry all of the markings required by the federal regulations listed at 16 C.F.R. pt. 305, see Cal. Code Regs. tit. 20, § 1607(d); and, furthermore, that certain federally regulated appliances must additionally be labeled with prescribed energy performance information, see *id.* § 1607(d)(2) & tbl.W.

The enforcement mechanism that stands behind these requirements is both powerful and destructive of interstate commerce. Simply put, no listed appliance may be sold in California unless, pursuant to § 1606, the manufacturer has submitted the required information to CEC and CEC has en-

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[9] *See, e.g.*, Cal. Code Regs. tit. 20, § 1606 tbl.V, at C (requiring information about the motor type, fan motor design and nominal horsepower of a central air conditioner); *id.* § 1606 tbl.V, at F (voltage of heat pump water heaters); *id.* § 1606 tbl.V, at K (wattage of lamps); *id.* § 1606 tbl.V, at S (rated horsepower of electric motors).

tered the information into its database, and unless the labeling requirements of § 1607 are met. See *id.* § 1608(a).

II. PROCEDURAL BACKGROUND

1. CEC adopted the challenged regulations in 2002. Before the regulations went into effect, the four trade associations that are petitioners here ("the Associations") sought a preliminary injunction to prevent implementation of the regulations. The district court granted a preliminary injunction as to most of the challenged provisions. Pet. App. 26a-27a.

In response to the injunction, the CEC undertook an emergency rulemaking by which it amended certain of the state regulations, Pet. App. 27a, and which mooted certain aspects of the Associations' challenge. That rulemaking did not resolve all of the regulations' infirmities, so the Associations moved for—and were granted—a permanent injunction. Relevant here, the CEC was enjoined from implementing the information-disclosure provisions of § 1606, *id.* at 36a-39a; the marking provisions of § 1607, *id.* at 29a-35a; and various aspects of the § 1608 enforcement regime, *id.* at 40a-41a.

The district court properly recognized that § 1606's information-disclosure requirements force manufacturers to submit data to CEC that is, in the language of the preemption provision, "with respect to any measure of energy consumption or water use." 42 U.S.C. § 6297(a)(1). The court rejected CEC's argument that the term "disclosure of information" in § 6297 preempts only state requirements concerning information that is disclosed to consumers at the point of sale, *id.* at 36a-38a. Further, the district court held, § 1607's labeling obligations require manufacturers to include information on their products that federal regulations do not mandate, and therefore the regulation is preempted. *Id.* at 29a-32a.

2. On appeal, a divided panel of the Ninth Circuit reversed. After praising California's "laudable" regulatory regime, Pet. App. 2a, the court proceeded to employ a strong "presumption against preemption," *id.* at 4a. It determined that every

claim of preemption must be met with a "starting presumption that Congress did not intend to supplant state law" and that, accordingly, "express preemption statutory provisions should be given a narrow interpretation." *Id.* It then imposed a series of "narrow interpretation[s]" on the federal preemption provisions. With regard to information disclosure, its "narrow interpretation" of § 6297 caused it to interpret the term "disclosure of information" to encompass only "disclosure of information *on labels directed to consumers at point of sale or use*." *Id.* at 7a (emphasis added); see also *id.* at 8a-12a. Measuring § 1606 against these criteria, it held that the regulations are not preempted.

The court likewise determined that the federal preemption provisions are subject to a "narrow interpretation" with regard to California's labeling regulations. In service of its narrowing construction, it limited the capacious phrase "with respect to," and thereby determined that California's labeling requirements were not "with respect to any measure of energy consumption," Pet. App. 15a-16a (quoting 42 U.S.C. § 6297)—despite the fact that CEC had conceded as much before the district court. And, it went on to conclude, where Congress had authorized federal agencies to promulgate certain labeling standards but the agencies had not yet done so, California's own labeling requirements could not be preempted as "other than information required" under federal law. *Id.* at 17a-19a.

Judge Noonan dissented. He recognized that the court's responsibility in interpreting the statute was to employ "an exact reading of [the] broad term ['disclosure']." Accordingly, he began with the plain meaning of the phrase "disclosure of information," Pet. App. 21a (quoting *Webster's Third New International Dictionary* (3d ed. 1993)), and, on that basis, concluded that the term "disclosure" was "compendious," and that CEC's regulations are preempted. *Id.* at 21a-22a. He criticized the majority for its "[i]mpatience with the restraints imposed by the precise preemptive words of the statute," and

for "indulg[ing] idiosyncratic imagination" in its interpretation of the phrase "other than." *Id.* at 22a. And, finally, he recognized that the majority's application of a "presumption against preemption" was unwarranted. Thus, he suggested, this Court's reversal of the Ninth Circuit's decision in *EMA* "may be augury of what is to come." *Id.*

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISION IN *ENGINE MANUFACTURERS ASSOCIATION.*

Just two Terms ago, in *EMA*, eight Justices of this Court made it plain that an express preemption provision should be interpreted according to its text and structure, and that courts may not read artificial limitations into a statute that appear nowhere on its face—which is precisely what the court below did in this case. The lower court's approach in *EMA* was attacked by the United States in its amicus brief as harmful to the federal interests embodied in the Clean Air Act. The decision below in this case threatens manufacturers with just the sort of patchwork of state regulation that this Court deemed unacceptable in *EMA*, in accordance with the views of the Solicitor General. The result in this case harms manufacturers, and undermines the significant federal interest in uniformity embodied in 30 years of federal energy legislation.

1. In the decision below, the Ninth Circuit employed precisely the same interpretive methodology that it used in *EMA*, and that this Court rejected. Just as in *EMA*, the lower court began with a robust presumption against preemption. Pet. App. 4a & n.1.[10] With that presumption in hand, the court then applied a "narrow interpretation" to the federal preemption provision, § 6297. The phrase "narrow interpretation"

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[10] As this petition demonstrates, the Ninth Circuit employed this presumption improperly and in conflict with decisions of this Court and other courts of appeals. *See infra* Section II.

and its variants appear *twelve times* in the majority opinion, see *id.* at 4a, 7a, 8a & n.5, 12a, 14a—an unmistakable indication that the court intended to constrict the statute's plain meaning. And, that is precisely what it did. The federal statute preempts "any State regulation [that] provides at any time for the disclosure of information with respect to any measure of energy consumption," if the regulation requires "testing," "the use of any measure of energy consumption," or "disclosure of information" "other than" that required by the federal statute. 42 U.S.C. § 6297(a)(1)(A), (B). Here, it is undisputed that the California regulations require manufacturers to provide information that the federal regime does not. When confronted with the statutory phrase "disclosure of information," however, the Ninth Circuit interpreted it to mean "only" "labeling directed to consumers at point of sale or use." Pet. App. 8a. Not all state regulations that require manufacturers to "disclose" information would be preempted, but rather only those that meet the Ninth Circuit's nontextual conditions.

As a threshold matter, this interpretation is a "radical reduction of the key statutory term[] '[d]isclosure,'" which assuredly has no built-in exception for divulgences to the government. Pet. App. 21a (Noonan, J., dissenting); see also *id.* ("Just as the meaning of 'disclose' is 'to expose to view' or 'to make known,' so the substantive noun referencing such an act is so extensive that it encompasses every compulsory revelation of the relevant information."); *Webster's Third New International Dictionary* 645 (3d ed. 1993) (defining "disclosure" broadly to include "the act or an instance of opening up to view, knowledge or comprehension"); *Black's Law Dictionary* 497 (8th ed. 2004) ("[t]he act or process of making known something that was previously unknown"). Nor does the distinction drawn by the Ninth Circuit make sense in any event, because CEC makes available to the public the information that it requires manufacturers to provide—

a fact that CEC itself touted to the Ninth Circuit. See Appellants' Opening Br. at 8-9.

2. Leaving aside these obvious errors, what is critical here—and what undeniably merits this Court's attention—is that the Ninth Circuit employed precisely the interpretive methodology in the decision below that this Court rejected in *EMA*. As in this case, the Ninth Circuit in *EMA* began by employing presumptions and narrowing constructions. *EMA*, 158 F. Supp. 2d 1107, 1111 (C.D. Cal. 2001), *aff'd*, 309 F.3d 550 (9th Cir. 2002) (per curiam).[11] It then concluded that a provision of the Clean Air Act, which forbids States from adopting or enforcing "*any* standard relating to the control of emissions from new motor vehicles," 42 U.S.C. § 7543(a) (emphasis added), did not preempt (as this Court characterized the argument) "standards imposed through purchase restrictions," 541 U.S. at 256. On review, by contrast, this Court began with the language of the statute, and interpreted the plain meaning of the text with reference to dictionaries. *Id.* at 252-53. Agreeing with the Solicitor General that the Ninth Circuit's interpretation was "untenable as a textual matter," Br. of United States at 24, *EMA*, 541 U.S. 246 (2004) (No. 02-1343), this Court roundly rejected the attempt to give the statute a "qualified meaning," because that qualification had "no basis in the text of the statute." 541 U.S. at 254, 255. The Court recognized that, because the plain text of the statute is "categorical," the statute admitted of no exceptions for certain subsets of "standards" favored by the state regulators (namely, "standards imposed through purchase restrictions"). *Id.* at 256.

EMA and the decision below are indistinguishable. In each case, the underlying statute employs a common English word that the statute did not define in specialized fashion: "standards" and "disclosure." In each case, the Ninth Circuit em-

[11] The Ninth Circuit issued an order adopting in whole the district court's "well-reasoned opinion," 309 F.3d at 551, so all citations are to the district court opinion.

ployed a nontextual limiting construction that preserved the "laudable" state regulation from preemption. In *EMA*, this Court granted certiorari to reverse the Ninth Circuit's mistaken limiting construction that did serious violence to important federal interests in uniform regulation. It should do the same here.

II. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS REGARDING THE "PRESUMPTION AGAINST PREEMPTION."

The court of appeals' erroneous decision, and the resulting conflict with this Court's decision in *EMA*, resulted in large measure from its improper application of the so-called "presumption against preemption," which caused it to misconstrue the statute in an inappropriately narrow fashion. This Court has explained that the presumption is not appropriate in all situations, but the decision below ignored that admonition. And, in that regard, the decision below is not alone; at least two other circuits have applied the presumption in the same mistaken fashion (in contrast to at least five circuits that faithfully apply this Court's precedents). Accordingly, review is additionally warranted to address the conflict between the Ninth Circuit's decision and this Court's precedents, and to resolve the conflict among lower courts on this issue.

1. This Court has, in recent years, plainly and repeatedly made clear that the "presumption against presumption" applies *only* to subjects that States traditionally have occupied. See Pet. App. 22a (Noonan, J., dissenting) ("[The] presumption against preemption [is] only triggered by ... showing the field to be one traditionally occupied by the states."). In *Buckman Co.* v. *Plaintiffs Legal Committee*, the Court held that a question of preemption in "'a field which the States have traditionally occupied' ... warrant[s] a presumption against finding federal pre-emption of a state-law cause of action." 531 U.S. 341, 347 (2001) (citation omitted). But, because no such regulatory field was at issue in that case, "no

presumption against pre-emption obtains." *Id.* at 348. Other cases have held likewise. See, *e.g.*, *Bates* v. *Dow Agrosciences LLC*, 125 S. Ct. 1788, 1801 (2005) ("In areas of traditional state regulation, we assume that a federal statute has not supplanted state law ...."); *United States* v. *Locke*, 529 U.S. 89, 107-08 (2000) ("'assumption' is triggered where 'the field which Congress is said to have pre-empted has been traditionally occupied by the States"); *De Buono* v. *NYSA-ILA Med. & Clinical Servs. Fund*, 520 U.S. 806, 813 n.8. (1997). In addition, the presumption does not apply "when the State regulates in an area where there has been a history of significant federal presence." *Locke*, 529 U.S. at 108.

The Ninth Circuit's rule conflicts directly with these precedents. That court holds that the presumption *always* applies *unless* there is a "history of significant federal presence." Pet. App. 4a. This analysis turns the governing rule on its head: This Court's default rule is that the presumption does not apply, whereas the Ninth Circuit's default rule is that the presumption does apply. Although it is assuredly true that a history of federal regulation is a sufficient condition to assume preemption, see *Locke*, 529 U.S. at 108, it is just as certainly not a necessary condition, as the Ninth Circuit held. And, it is clear that this is the rule the lower court employed, because it made no effort to consider whether energy conservation is a traditional area of state regulation; rather, it simply reasoned that the presumption against preemption mandated a "narrow interpretation" of the federal statute. Pet. App. 4a.

Here, there is no tradition of state regulation that could justify butchering the plain meaning of Congress's express preemption provision. As noted above, the CEC was created in 1975—the same year EPCA was enacted—and in response to the same event (the Arab oil embargo). California did not require energy-efficiency information disclosure in any form until 1977, Pet. App. 2a, and most of the current requirements did not come until substantially later. The fact that one State began to regulate efficiency information concerning appli-

ances *after* the federal government did so hardly qualifies this as "'a field which the States have traditionally occupied.'" *Buckman*, 531 U.S. at 347. *EMA* demonstrates that such a limited history is not enough. There, the California governmental entity asserted that California's efforts to regulate motor vehicle emissions predated federal efforts by nearly a decade, but this Court saw no cause to apply a presumption against preemption. *A fortiori*, no presumption is applicable here, where federal and state regulation were, at most, contemporaneous. The rule announced by the Ninth Circuit, in short, directly conflicts with this Court's precedents, and the petition should accordingly be granted.

2. The need for review is all the more acute because there is a conflict among the federal courts of appeals over the circumstances in which a presumption against preemption should apply. The First, Second, Eighth, Eleventh and District of Columbia Circuits hold, consistent with this Court's precedents, that the presumption against preemption applies to a field in which there is a "significant" history of state regulation, or that is a "traditional" area of state regulation. See *UPS, Inc.* v. *Flores-Galarza*, 318 F.3d 323, 336 (1st Cir. 2003) (the presumption against preemption "only arises ... if Congress legislates in a field traditionally occupied by the states"); *Wachovia Bank, N.A.* v. *Burke*, 414 F.3d 305, 314 (2d Cir. 2005); *Forest Park II* v. *Hadley*, 336 F.3d 724, 731 (8th Cir. 2003) *Cliff* v. *Payco Gen. Am. Credits, Inc.*, 363 F.3d 1113, 1125 (11th Cir. 2004); *Massachusetts* v. *United States Dep't of Transp.*, 93 F.3d 890, 894 (D.C. Cir. 1996); see also *Bronco Wine Co.* v. *Jolly*, 95 P.3d 422, 429 (Cal. 2004), *cert. denied*, 125 S. Ct. 1646 (2005).

In conflict with this rule, the Fourth and Seventh Circuits have adopted the broader formulation of the Ninth Circuit, and treat a presumption against preemption as the default rule. See *Pinney* v. *Nokia, Inc.*, 402 F.3d 430, 453 (4th Cir. 2005), *petitions for cert. filed*, 74 U.S.L.W. 3108, 3114 (U.S. Aug. 10, 2005) (Nos. 05-198, 05-207); *College Loan Corp.* v. *SLM*

Corp., 396 F.3d 588, 597 (4th Cir. 2005); *Frank Bros., Inc.* v. *Wisconsin Dep't of Transp.*, 409 F.3d 880, 885 (7th Cir. 2005) ("we presume that, *in all circumstances*, 'Congress does not intend to supplant state law'" (emphasis added)). As this case shows, preemption will often turn on whether the court attempts to apply the ordinary meaning of the statute, or an artificially narrow one. Accordingly, the starting point is outcome determinative, and a conflict among the circuits on such a fundamental issue of federal supremacy warrants this Court's review.

3. Having mistakenly applied the presumption against preemption, the Ninth Circuit believed that it should therefore employ a "narrow interpretation" of the federal preemption provisions, which in turn led to multiple errors in the decision below. As noted above, the lower court interpreted the term "disclosure of information," as it applies to § 1606's disclosure provisions, in a mistakenly narrow fashion. See *supra* Section I. It did likewise with regard to the marking requirements contained in § 1607 of the California regulations.

Section 6297 preempts state regulations that require a "disclosure of information" that is "*with respect to* any measure of energy consumption or water use of any covered product," 42 U.S.C. § 6297(a)(1) (emphasis added), if the disclosure of information is not required by the federal statute, *id.* § 6297(a)(1)(B). The linchpin here is the phrase "with respect to." The statute does not merely preempt "measure[s] of energy consumption or water use"—it also preempts any regulation that is "with respect to" such a measure. The phrase "with respect to" by its nature indicates the expansive preemptive scope of the provision. This Court repeatedly has held that modifiers like this one indicate a "broad pre-emptive purpose." See, *e.g.*, *Morales* v. *Trans World Airlines*, 504 U.S. 374, 383-84 (1992) (interpreting the phrase "related to" in ERISA).

The information that must be included on product labels pursuant to California marking requirements is assuredly

"*with respect to* any measure of energy consumption." Section 1607 of the California regulations requires manufacturers to include on the label its name, brand name or trademark; the appliance's model number; and the date of manufacture. Cal. Code Regs. tit. 20, § 1607(b)(1)-(3). The very purpose of this regulation is to govern measures of energy consumption. The regulation appears within the title of the California Code of Regulations devoted to "Public Utilities and Energy"; in a division of that title entitled "State Energy Resources Conservation and Development Commission"; in an article named "Appliance Efficiency Regulations"; and the self-evident purpose of these labeling requirements is to assist in making determinations about the product's compliance with energy consumption standards. Indeed, CEC conceded as much in the district court. Tr. of 12/05/2002 Hr'g on Mot. for Prelim. Inj., at 41-42.

The Ninth Circuit, however, failed to accord this phrase its common and broadly preemptive meaning. That court showed no recognition of the breadth of the phrase. It cited *Egelhoff* and *Travelers*, in which this Court reaffirmed that "relates to" preemption is "clearly expansive," but it made no mention of that holding. Pet. App. 15a; see *Egelhoff* v. *Egelhoff ex rel. Breiner*, 532 U.S. 141, 147 (2001); *New York State Conf. of Blue Cross & Blue Shield Plans* v. *Travelers Ins. Co.*, 514 U.S. 645, 655 (1995). Instead, the lower court employed only the language from those cases stating that there must be some outer limit on the term "relates to." See, *e.g.*, *Egelhoff*, 532 U.S. at 146 ("the term 'relate to' cannot be taken 'to extend to the furthest stretch of its indeterminacy'"); see Pet. App. 15a.

This is of course true, but it hardly means—as the Ninth Circuit interpreted it—that the preemptive phrase must be "narrowly interpreted." On the contrary, *Egelhoff* recognizes that a broadly framed term like "relates to" preempts everything that "'has a connection with or reference to'" the preempted field. 532 U.S. at 147. And, the labeling require-

ments of § 1607(d)(2) surely have "a connection with" "measure[s] of energy consumption." They are not "generally applicable laws regulating 'areas where [the federal statute] has nothing to say,'" *id.* at 147-48; they are instituted for the very purpose of supplementing the federal regulations. Moreover, by imposing requirements that the federal statute and regulations do not, the California regulations "interfere[] with nationally uniform" labeling, and "subject [manufacturers] to different legal obligations in different States." *Id.* at 148. In short, the lower court's mistaken use of the presumption against preemption led it to a result that is directly contrary to the system of national uniformity that Congress envisioned.

The decision below was similarly mistaken in its interpretation of § 1607(d)(2), and its error again seems rooted in the court's "narrow interpretation" of the statute. Section 1607(d)(2) of the California regulations requires manufacturers of specified products to label the products with "energy performance information." The Ninth Circuit reasoned that because § 6297 preempts only "disclosure of information" that is "other than information required under" the federal statute, 42 U.S.C. § 6297(a)(1)(B), and because no federal regulation yet governs disclosure of this information, this requirement is not "other than" a federal requirement.

This interpretation simply makes no sense unless the sole purpose of the interpretive exercise is to preserve state law. Because the federal regulations do not yet require any information to be disclosed, the state requirement of course mandates a "disclosure of information" that is "*other than* information required under" the federal scheme. As Judge Noonan recognized in dissent:

> Where there are no federal regulations on the subject because the DOE has not promulgated any regulations, then any state regulations are "other than" those federally required. The court indulges idiosyncratic imagination in supposing that there must be federal regulations

> in existence for "other than" to apply. Au contraire, if nothing exists, any state regulations are other than what exists as federal regulation. The fundamental tenet of express preemption is that Congress may preclude state involvement, even where it chooses not to regulate. Through its misreading of "other than" the court has imposed a heightened burden on the manufacturers to show implied preemption, despite Congress' express statement of preemption.

Pet. App. 22a. If California thinks that the Department of Energy has an obligation to adopt labeling requirements, the appropriate response is not to plow ahead with regulations of its own in violation of the statutory preemption provision; rather, it may seek to compel the Department of Energy to adopt regulations by using the citizen-suit provision created by Congress. See 42 U.S.C. § 6305(a)(2).[12]

The Ninth Circuit's contrary, anti-preemption interpretation of "other than" would lead to a race to regulate. Any State that regulated in advance of the federal government would, as a practical matter, be able to force manufacturers to comply on a national basis with that State's regulatory desires. Even if such state regulations later were preempted by subsequent federal regulations, the very harms Congress sought to prevent would already have occurred. See S. Rep. No. 100-6, at 4 (1987), *reprinted in* 1987 U.S.C.C.A.N. at 54-55 (absent federal preemption, "[r]egulations in a few populous States could as a practical matter determine the product lines sold nationwide, even in States where no regulations existed"). [13]

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[12] CEC is well aware of this provision, having just employed it in an effort to force the Department of Energy to issue energy efficiency standards. See Complaint, *State of New York* v. *Bodman*, No. 05-CV-7807 (S.D.N.Y. filed Sept. 7, 2005).

[13] The Ninth Circuit's interpretation finds no support in *Puerto Rico Department of Consumer Affairs* v. *Isla Petroleum Corp.*, 485 U.S. 495 (1988); see Pet. App. 18a (relying on same). That case, unlike this one, dealt with the decidedly "untypical claim" that preemption existed despite

This only confirms that the court below was mistaken in applying its "narrow interpretation" to the federal preemption provisions.

* * * *

Whether and when to apply the presumption against preemption is an important issue of federal law, as it implicates important issues of federal power and of federalism. Were the Fourth, Seventh and Ninth Circuits correct in their application of the presumption, it would mean that other courts of appeals are preempting state law too readily, and therefore improperly trenching on state power. But the Ninth Circuit and its colleagues are incorrect (as this Court and at least five courts of appeals have held) and therefore the danger is quite a different one—namely, that important federal interests, including in uniformity of national policy, are being thwarted. As the following section demonstrates, that is precisely what has happened in the critical realm of national energy policy, which reinforces the need for this Court's review.

III. THE DECISION BELOW, IN UNDERMINING FEDERAL UNIFORMITY, IMPLICATES IMPORTANT FEDERAL INTERESTS AND IMPOSES GREAT HARM ON NATIONAL MANUFACTURERS.

In addition to the conflicts set forth above, this case further merits review because it implicates important federal interests, and because it has practical consequences for manufacturers and for the system of uniformity that Congress sought to impose.

1. Congress has made unmistakably clear that it views energy efficiency to be a matter of surpassing federal impor-

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the fact that "Congress ha[d] withdrawn from all substantial involvement in" the relevant field. 485 U.S. at 500, 504. There, the claim of preemption was based on "nothing more than excerpts from ... legislative history," *id.* at 501; here, preemption is mandated by a broadly phrased express preemption provision.

tance. As set forth above, this is plain from Congress's enactment of express preemption provisions in §§ 6297 and 6316; from the implementation of expansive statutory and regulatory regimes by Congress, the Department of Energy and the Federal Trade Commission; and from the safety valve established by § 6297(d), which expressly favors national interests over state ones. See 42 U.S.C. § 6297(d)(3) (providing that the safety valve is unavailable if "State regulation will significantly burden manufacturing, marketing, distribution, sale, or servicing ... *on a national basis*" (emphasis added)).

The national importance of the issue is likewise clear from Congress's repeated statements on the subject. When Congress enacted EPCA in 1975, it recognized that the "nation has entered a new era" regarding energy supply, which "underscored ... the need for policy decisions at the national level." H.R. Rep. No. 94-340, at 1 (1975), *reprinted in* 1975 U.S.C.C.A.N. 1762, 1763. In fact, Congress treated energy policy as a matter of foreign policy and "national security," *id.* at 4, 1975 U.S.C.C.A.N. at 1766; S. Conf. Rep. No. 94-516, at 117, 1975 U.S.C.C.A.N. at 1957, which are quintessentially matters of national concern. With each new enactment concerning energy efficiency, Congress has reiterated the national importance of energy policy. See, *e.g.*, H.R. Rep. No. 94-340, at 2, 1975 U.S.C.C.A.N. at 1763 (section setting forth "requirements for a national energy policy" (capitalization omitted)); H.R. Rep. No. 100-11, at 26 ("Appliance efficiency has been a subject of national interest since at least the initial energy price jolts of the early 1970's."); S. Rep. No. 100-6, at 2, 1987 U.S.C.C.A.N. at 52 (one purpose of NAECA is "to reduce the regulatory and economic burdens on the appliance manufacturing industry through the establishment of *national* energy conservation standards" (emphasis added)). In short, this is a matter of *national* policy to which Congress has crafted a *national* response, which is, after all, precisely the meaning and purpose of a preemption provision.

2. What is more, it is plain from the record in this case that the California regulations will cause the exact harms that Congress sought to avoid when it enacted §§ 6297 and 6316. In national energy statutes, Congress struck a balance between increased federal regulation and a "patchwork" of state regulation that would impose massive regulatory burdens on manufacturers. The California regulations at issue totally upset that balance by imposing the sort of burdens that Congress meant to preempt.

First, the information-disclosure requirements will impose significant costs because they require manufacturers to disclose—and therefore to collect—data that is not otherwise generated by federally mandated testing procedures.[14] The record reflects, for instance, that certain manufacturers will have to build expensive test models in order to perform the tests and compile the data that the regulations require; others will have to purchase new labeling equipment and software. One company estimates its resulting compliance costs at over $3 million; others have estimated their costs of building test models in the hundreds of thousands of dollars. Even for manufacturers that do not anticipate building new test models, to perform the newly required testing will itself be extremely costly—again, in the hundreds of thousands of dollars for certain manufacturers.[15] The process will in any event be burdensome; manufacturers of air-conditioning units will, for instance, be required to test for, gather and calculate numerous additional types of data.[16]

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[14] *See, e.g.*, Decl. of Dr. Karim Amrane at 2-4; Decl. of James T. VerShaw at 5-6. Each of these declarations, as well as those in the footnotes that follow, was filed in support of the Associations' motion for a preliminary injunction.

[15] *See, e.g.*, Decl. of Frank Myers at 2-3; Decl. of Jim C. Smelcer at 2-3; Decl. of Robert J. Rasp at 2; Decl. of William T. Harrigill at 3; Decl. of Dr. Mark Hogan at 5; Decl. of Charles W. Adams at 3;

[16] *See, e.g.*, Decl. of Daniel J. Arnold at 4; Decl. of Fred J. Keller at 4; *cf. also* declarations cited *supra* note 14.

The labeling requirements of § 1607 are similarly burdensome. The CEC regulations would require many manufacturers to purchase new labeling equipment, or to retool or reprogram their existing equipment. Numerous manufacturers would incur costs in the tens or hundreds of thousands of dollars; some would incur costs in this range *per year*; and others would incur ultimate costs in the millions of dollars.[17] And, it must be noted, at least some of the California requirements serve no obvious conservation purpose—they would require substantial expense, for instance, to print the date of manufacture (which already appears on product labels) in a new, California-mandated format.

The impact of all of these requirements is exacerbated by the § 1608 enforcement mechanism. Under that provision, no product may be sold in California unless it meets the requirements of § 1606 and § 1607. Given the size of the California economy, the § 1608 enforcement mechanism ensures that every product produced for sale anywhere in the United States must meet the CEC standards, because manufacturers do not know whether a given product will eventually be distributed to California. Congress expressly recognized this prospect when it enacted NAECA, and intended to prevent it.

* * * *

California's agency sought to achieve the same result in *EMA*—imposing requirements on an entire industry—that CEC seeks to accomplish here, and this Court granted review to protect national interests and those of the other 49 States. It should do so here as well. If California wants to impose requirements, the statute has a mechanism, 42 U.S.C. § 6297(d), but California has not used that safety valve. Instead, it seeks to impose its will unilaterally on all appliance

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[17] *See, e.g.*, Decl. of Howard Wolfman at 2; Decl. of Robert B. Boteler at 2; Decl. of Joseph G. Howley, Jr. at 2; Decl. of Daniel J. Canclini at 2; Decl. of Irvin L. Derks at 2; Decl. of James T. VerShaw at 4; Decl. of Francis L. Franck at 3; Decl. of Robert J. Rasp at 3.

manufacturers. That is a situation that only this Court can correct, and it should grant review to do so.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT.

No. 03-16621

AIR CONDITIONING AND REFRIGERATION INSTITUTE; GAS APPLIANCE MANUFACTURERS ASSOCIATION; ASSOCIATION OF HOME APPLIANCE MANUFACTURERS; NATIONAL ELECTRICAL MANUFACTURERS ASSOCIATION,

Plaintiffs-Appellees,

v.

ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION; WILLIAM J. KEESE, Chairman; ROBERT PERNELL, Commissioner; AURTHUR H. ROSENFELD, Commissioner; JAMES D. BOYD, Commissioner; JOHN L. GEESMAN, Commissioner,

Defendants-Appellants.

Argued and Submitted Nov. 1, 2004
Opinion Filed Feb. 3, 2005
Amended June 3, 2005

Appeal from the United States District Court for the Eastern District of California; William B. Shubb, Chief Judge, Presiding. D.C. No. CV-02-02437-WBS/PAN.

Before: B. FLETCHER, NOONAN, and THOMAS, *Circuit Judges*.

AMENDED OPINION

THOMAS, *Circuit Judge*.

This case presents the question of whether federal law preempts California's appliance regulations requiring appli-

ance manufacturers to submit data about their appliances to California's Energy Resources Conservation and Development Commission ("Commission"), mark their appliances with basic information such as brand name and energy performance, and be subjected to related compliance and enforcement rules. We conclude that federal law does not preempt California's regulations. We therefore reverse the district court's decision finding the regulations preempted and permanently enjoining the Commission from enforcing these regulations, vacate the injunction, and remand.

I

California boasts an extensive and laudable appliance efficiency program. As part of California's program, the Commission has, since 1977, required manufacturers to submit data to it. The data collected by the Commission pursuant to section 1606 of Title 20 of the California Code of Regulations is maintained in an electronic database, which contains information on over 135,000 appliance models. The Commission's database provided the foundation of information for the Environmental Protection Agency's Energy Star program and is used frequently by consumers, energy consultants, contractors, researchers, utility program managers, manufacturers, and other governmental agencies. As part of California's appliance program, the Commission also requires manufacturers to put basic information—such as the manufacturer's brand name and the appliance's size and energy performance—on their appliances. Cal.Code Regs. tit. 20, § 1607(b)-(d)(2). The Commission enforces the data submittal and marking requirements it places on manufacturers under section 1608. Cal.Code Regs. tit. 20, § 1608.

Plaintiffs-Appellees, four major trade organizations representing appliance manufacturers nationwide ("Trade Associations"), claim that these California regulations are preempted by the Energy Policy and Conservation Act, Pub. Law No. 94-163, 89 Stat. 871 (1975) ("EPCA"), specifically by 42

U.S.C. §§ 6297(a) and 6316(a)-(b). After these regulations were adopted but before they went into effect, Trade Associations filed suit for declaratory and injunctive relief in the United States District Court for the Eastern District of California. The district court held that the California regulations are preempted. The court, first preliminarily and then permanently, enjoined the Commission from enforcing the regulations. The Commission timely appealed.

We review the district court's decision regarding preemption *de novo*, *Chamber of Commerce v. Lockyer*, 364 F.3d 1154, 1160 (9th Cir.2004), and the district court's grant of permanent injunction for abuse of discretion, *Ting v. AT & T*, 319 F.3d 1126, 1134-35 (9th Cir.2003).

II

Preemption can occur in one of three ways: express preemption by statute, occupation of the field, or conflict between state and federal regulation. *English v. General Elec. Co.*, 496 U.S. 72, 78-79, 110 S.Ct. 2270, 110 L.Ed.2d 65 (1990). All parties agree that this case presents a question of express preemption. Thus, this case boils down to the interpretation of the statutory provision that allegedly preempts state law. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 484, 116 S.Ct. 2240, 135 L.Ed.2d 700 (1996); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 517, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992).

To determine whether California's regulations are preempted by EPCA, we are instructed to first "'identify the domain expressly pre-empted' by that language." *Medtronic*, 518 U.S. at 484, 116 S.Ct. 2240 (quoting *Cipollone*, 505 U.S. at 517, 112 S.Ct. 2608). "Since pre-emption claims turn on Congress's intent, we begin as we do in any exercise of statutory construction with the text of the provision in question, and move on, as need be, to the structure and purpose of the Act in which it occurs." *New York State*

Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 655, 115 S.Ct. 1671, 131 L.Ed.2d 695 (1995) (internal citations omitted).

Our interpretation of the federal statute is informed by two presumptions about the nature of preemption. *Medtronic*, 518 U.S. at 485, 116 S.Ct. 2240. First, we address claims of preemption with the starting presumption that Congress did not intend to supplant state law. *Id.* Where, as is the case here, the State regulates in an area where there is no history of significant federal presence, *United States v. Locke*, 529 U.S. 89, 108, 120 S.Ct. 1135, 146 L.Ed.2d 69 (2000),[1] we assume that the "historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Id.* (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 91 L.Ed. 1447 (1947)). This presumption against preemption leads us to the principle that express preemption statutory provisions should be given a narrow interpretation. *Id.*; *Cipollone*, 505 U.S. at 518, 112 S.Ct. 2608.

Second, our analysis of the scope of the statute's preemption is guided by the Supreme Court's oft-stated com-

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[1] *Compare infra* Part III.A (discussing legislative history of EPCA), *with Locke*, 529 U.S. at 108, 120 S.Ct. 1135 (finding the presumption against preemption does not apply where the federal interest in the area the State enacted legislation in, interstate navigation, "has been manifest since the beginning of our Republic"), *and Ting*, 319 F.3d at 1136 (finding that the presumption against preemption does not apply "because of the long history of federal presence in regulating long-distance telecommunications"), *and Bank of Am. v. City & County of San Francisco*, 309 F.3d 551, 559 (9th Cir.2002) (finding that the presumption against preemption does not apply because of the history of significant federal presence in national banking), *and Skysign Int'l, Inc. v. City & County of Honolulu*, 276 F.3d 1109, (9th Cir.2002) (finding that presumption against preemption does not apply where aerial signage ordinance specifically targeted navigable airspace, an area where there is a history of significant federal presence).

ment that "the purpose of Congress is the ultimate touchstone in every pre-emption case." *Medtronic*, 518 U.S. at 485, 116 S.Ct. 2240 (internal quotations marks omitted). "As a result, any understanding of the scope of a pre-emption statute must rest primarily on 'a fair understanding of congressional purpose.'" *Id.* at 485-86, 116 S.Ct. 2240 (quoting *Cipollone*, 505 U.S. at 530, n. 27, 112 S.Ct. 2608) (emphasis omitted).

Also relevant to our interpretation of the scope of the statute's preemption are the "structure and purpose of the statute as a whole, as revealed not only in the text, but through [our] reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law." *Id.* at 486, 116 S.Ct. 2240 (internal citation and quotation marks omitted).

III

Thus, we turn to the language of the express preemption provision at issue. 42 U.S.C. § 6297[2] provides, in relevant part:

> (a) Preemption of testing and labeling requirements
>
> (1) Effective on March 17, 1987, this part supersedes any State regulation insofar as such State regulation provides at any time for the disclosure of information with respect to any measure of energy consumption or water use of any covered product if—
>
> (A) such State regulation requires testing or the use of any measure of energy consumption, water use, or

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[2] 42 U.S.C. § 6316(a)-(b), the other preemption provision at issue in this case, incorporates § 6297(a) with a few subtle distinctions that are not relevant to this case. 42 U.S.C. § 6316(a)-(b) relates to commercial and industrial appliances whereas § 6297(a) relates to residential appliances. Hereinafter, when we refer to 42 U.S.C. § 6297(a), in doing so, we also refer to § 6316(a)-(b).

> energy descriptor in any manner other than that provided under section 6293[3] of this title; or
>
> (B) such State regulation requires disclosure of information with respect to the energy use, energy efficiency, or water use of any covered product other than information required under section 6294[4] of this title.

42 U.S.C. § 6297.

A. Data Submittal Regulation

The first California regulation that 42 U.S.C. § 6297(a) arguably preempts is Cal.Code Regs. tit. 20, § 1606, which requires appliance manufacturers to submit specified information to the Commission for each appliance for sale or sold in California. Such information includes the name of the manufacturer, the brand name, the model number, and data produced during tests the manufacturer is required to perform under Cal.Code Regs. tit. 20, § 1604. *See* Cal.Code Regs. tit. 20, §§ 1606(a), Table U.

To determine whether 42 U.S.C. § 6297(a) preempts the data submittal requirements of Cal.Code Regs. tit. 20, § 1606, we look to the text of § 6297(a). Section 6297(a) preempts any state regulation that provides "at any time for the disclosure of information with respect to any measure of energy consumption or water use of any covered product if . . . such State regulation requires disclosure of information with respect to the energy use, energy efficiency, or water use of any covered product other than information required under section 6294." The district court found the text of § 6297(a), in particular the meaning of the phrase "disclosure of information," ambiguous, and so do we.

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[3] 42 U.S.C. § 6293 establishes federal appliance testing requirements.

[4] 42 U.S.C. § 6294 establishes federal appliance labeling requirements.

Beginning with the presumption that Congress did not intend to supplant state law, we must narrowly interpret § 6297(a) in general, and the phrase "disclosure of information" in particular. *See Medtronic*, 518 U.S. at 485, 116 S.Ct. 2240. A narrow interpretation is consistent with our direction to find preemption when preemption is the "clear and manifest purpose of Congress." *Id.* The narrow interpretation the Commission advances is supported by the statutory text and is consistent with Congress's purpose. Applying a narrow interpretation of § 6297(a), we hold that it does not preempt the data submittal requirements contained in Cal.Code Regs. tit. 20, § 1606.

The rules of statutory construction support the narrow interpretation of "disclosure of information." One rule of statutory construction is that "identical words used in different parts of the same act are intended to have the same meaning." *Commissioner of Internal Revenue v. Lundy*, 516 U.S. 235, 250, 116 S.Ct. 647, 133 L.Ed.2d 611 (internal citations and quotation marks omitted). The phrase "disclosure of information" is used twice in § 6297(a)(1) and should be given the same meaning in both instances. In § 6297(a)(1), "disclosure of information" concerns information with respect to any measure of energy consumption or water use. In § 6297(a)(1)(B), "disclosure of information" requires manufacturers to place certain information on consumer-directed product labels, as required by 42 U.S.C. § 6294. *See* 42 U.S.C. § 6294. In both instances, "disclosure of information" may be interpreted to generally refer to the disclosure of information on labels directed to consumers at point of sale or use. Thus, a narrow interpretation of § 6297 (a)(1) is supported by the statutory text, and this interpretation should be applied.

Furthermore, the statute as a whole compels a narrow interpretation of "disclosure of information." Congress did not use the phrase "disclosure of information" in EPCA when

it referenced manufacturers providing data to the Department of Energy ("DOE"); instead, Congress used the phrase "submit information or reports." 42 U.S.C. § 6296(d). 42 U.S.C. § 6296(d) allows the DOE to require appliance manufacturers to provide the DOE with information about energy efficiency.

42 U.S.C. § 6296(d) provides, in relevant part, "the Secretary may require . . . each manufacturer of a covered product to *submit information or reports* to the Secretary." *Id.* § 6296(d)(1) (emphasis added). When Congress referred to the submittal of data to a government entity in EPCA, it used the phrase "submit information or reports," not "disclosure of information." The statute as a whole does not support a broad interpretation of "disclosure of information." On the contrary, it suggests that "disclosure of information" only pertains to labeling directed to consumers at point of sale or use.[5]

In addition, the narrow interpretation of "disclosure of information" rests on "a fair understanding of congressional purpose" as evidenced by the relevant legislative history.

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[5] The narrow interpretation of the phrase "disclosure of information" is also supported by the relevant FTC regulations. 16 C.F.R. Part 305 establishes regulations regarding the consumer-directed labeling of appliances and the testing required to accurately label appliances. 16 C.F.R. pt. 305. Part 305 also includes regulations pertaining to the form and content of the labels, §§ 305.11-.14, and the testing manufacturers must perform in order to label with information regarding their appliances' energy efficiency or use, §§ 305.5-.10. The sections pertaining to the form and contents of the labels are clustered under the heading of "Required Disclosures." Section 305.8, which requires manufacturers to submit annually to the FTC a report listing the annual energy consumption or energy efficiency rating for each basic model in current production, is titled "Submission of data." The FTC regulations use "disclosure" to refer to consumer-directed labeling and "submission" to refer to data-submittal to a government entity. Therefore, the FTC regulations, like EPCA, use "disclosure" to refer to consumer-directed labeling and "submission" or "submit" to refer to data-submittal to the government.

Medtronic, 518 U.S. at 485-86, 116 S.Ct. 2240 (quoting *Cipollone*, 505 U.S. at 530, n. 27, 112 S.Ct. 2608) (internal quotation marks and emphasis omitted). The original version of the current labeling and testing pre-emption provision was first enacted in the EPCA, Pub. Law No. 94-163, 89 Stat. 871 (1975). Its purpose appears to be unchanged since then.

Congress enacted EPCA in 1975, in the aftermath of the oil embargo imposed against the United States by certain countries in the years prior. *Natural Res. Def. Council v. Herrington*, 768 F.2d 1355, 1364 (D.C.Cir.1985). The oil embargo called attention to the serious economic and national security problems associated with our nation's continued reliance on foreign energy resources. *Id.* In response, President Ford called for "the strongest and most far-reaching energy conservation program we have ever had." *Id.* (quoting 11 Weekly Comp. Pres. Doc. 40, 41 (Jan. 20, 1975)) (internal quotation marks omitted). Subsequently, Congress enacted EPCA, and in doing so, established a comprehensive energy policy. *Id.*

EPCA was designed, in part, to reduce the United States' "domestic energy consumption through the operation of specific voluntary and mandatory energy conservation programs." S.Rep. No. 94-516, at 117 (1975), *reprinted in* 1975 U.S.C.C.A.N. 1956, 1957. Part of EPCA's energy conservation program was to "[r]equire energy labeling of major home appliances and certain other consumer products, and authorize energy efficiency standards for major appliances." *Id.* at 118. Congress believed that better informed consumers and voluntary efforts by manufacturers would make energy efficiency standards unnecessary. H. Rep. No. 94-340, at 95 (1975), *reprinted in* 1975 U.S.C.C.A.N. 1762, 1857. Therefore, Congress required manufacturers to label their appliances and provided that the Secretary of the Federal Energy Administration should utilize energy efficiency standards if the labeling program proved ineffective. *Id.* at

99. As a result, EPCA's express preemption provisions dealt primarily with the possibility that states would adopt different test procedures or consumer labeling requirements. *See* Pub. Law No. 94-163, § 327, 89 Stat. 871, 926-27. EPCA preempted state regulations insofar as they were "other than" the applicable federal rules for testing and labeling. *Id.* § 327(a)(1), 89 Stat. at 927. EPCA, however, allowed state regulations that differed from the federal regulations if the state regulations were justified by a substantial state or local need, did not interfere with interstate commerce, and were more stringent than the federal standard. *Id.* § 327(b)(2), 89 Stat. at 927.

The National Energy Conservation and Policy Act, Pub.L. No. 95-619, 92 Stat. 3206 (1978) ("NECPA"), amended portions of EPCA's preemption provisions. States were still allowed to adopt regulations identical to federal regulations. *See* EPCA § 327(a)(2), 89 Stat. at 927. States were allowed to prescribe regulations more stringent than federal regulations—or, if there was no federal regulation, a state could implement its own standard—*only* if the Secretary found there was a significant state or local interest to justify the state's regulation and the regulation would not unduly burden interstate commerce. NECPA § 424(a), 92 Stat. at 3264. NECPA did not amend EPCA's preemption provisions regarding testing or labeling. *Id.*

On a larger scale, NECPA created a nationwide conservation program for appliances and required the DOE to prescribe minimum energy efficiency standards for thirteen covered products. *Herrington*, 768 F.2d at 1367; *see* H.R.Rep. No. 95-1751, at 114 15 (1978). However, instead of adopting energy efficiency standards, the DOE concluded in 1982 that establishing minimum energy efficiency standards for the relevant appliances would not result in significant energy conservation and would not be economically justified. H.R.Rep. No. 100-11, at 27. Thus, the DOE

determined no efficiency standards were required under NECPA. *Id.* "While DOE adopted its policy of the 'no-standard' standards, it also initiated a general policy of granting petitions from States requesting waivers from preemption. As a result, a system of separate State appliance standards ha[d] begun to emerge and the trend [was] growing." S.Rep. No. 100-6, at 4. The D.C. Circuit held that the DOE erroneously concluded that "nostandard" standards was appropriate and instructed the DOE to adopt federal efficiency standards. *Herrington*, 768 F.2d at 1433.

Because the DOE could not establish federal appliance efficiency standards immediately, major manufacturer trade associations and the Natural Resources Defense Council negotiated a compromise solution, which Congress enacted as the National Appliance Energy Conservation Act of 1987, Pub.L. No. 100-12, 101 Stat. 103 (1987) ("NAECA"), codified at 42 U.S.C. §§ 6291-6309. H.R.Rep. No. 100-11, at 27-28; S.Rep. No. 100-6, at 4-5, *reprinted in* 1987 U.S.C.C.A.N. 52, 54-55. NAECA established federal energy efficiency standards for residential appliances; DOE action was not required to set these standards. NAECA § 5, 101 Stat. at 107-17.

NAECA also amended NECPA's preemption provisions. NAECA provided that states could no longer adopt energy efficiency standards that were identical to the federal standards. 42 U.S.C. § 6297(c). NAECA also made it more difficult for states to obtain waivers of preemption for more stringent state efficiency standards; in order to obtain a waiver, NAECA required states to establish by a preponderance of the evidence that state regulation was justified by unusual and compelling state or local interests. 42 U.S.C. § 6297(d)(1)(B)-(C); *see* S.Rep. No. 100-6, at 9. The reason for the broader preemption standards was to counteract the systems of separate state appliance standards that had emerged as a result of the DOE's "general policy of granting

petitions from States requesting waivers from preemption," which caused appliance manufacturers to be confronted with "a growing patchwork of differing State regulations which would increasingly complicate their design, production and marketing plans." S.Rep. No. 100-6, at 4. As for the preemption provisions regarding testing and labeling, NAECA, "essentially restate[d] existing law, and provide[d] that the Act supersedes State and local regulations regarding testing and labeling in certain cases." *Id.* at 9.

The latest legislation amending EPCA is the Energy Policy Act of 1992, Pub.L. No. 102-486, 106 Stat. 2776 (1992) ("EPAct"), codified at 42 U.S.C. §§ 6311-17, which expanded the federal appliance program to include energy efficiency standards for commercial and industrial appliances. 42 U.S.C. §§ 6295(j)-(k), 6313. EPAct incorporated the preemption provisions of 42 U.S.C. § 6297, with a few subtle distinctions, which are not relevant to this case. 42 U.S.C. § 6316(a)-(b). EPAct's legislative history is silent on preemption.

In sum, the legislative history of the relevant Acts supports a narrow interpretation of the preemption provision. There is no indication that Congress, in the preemption provision of EPCA as amended by subsequent Acts, intended to preempt state regulations requiring the submission of data to state government agencies. The legislative history instead demonstrates that Congress intended to preempt state energy efficiency standards, testing procedures, and consumer labeling requirements. We therefore conclude that because "disclosure of information" only refers to consumer-directed labeling at point of sale or use, Cal.Code Regs. tit. 20, § 1606 is not preempted by 42 U.S.C. § 6297(a)(1).[6]

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[6] We also hold that Cal.Code Regs. tit. 20, § 1606 is not preempted by 42 U.S.C. § 6316(a)-(b), which is substantively the same as § 6297(a)(1).

B. Marking Regulations

The second set of California's regulations the Trade Associations argue is preempted by federal law are the appliance-marking requirements of sections 1607(b), (c), (d)(1), and (d)(2) of Title 20 of the California Code of Regulations.

Section 1607(b)[7] and (c)[8] of Title 20 of the California Code of Regulations—which require appliances to be labeled with the manufacturer's name, brand name, or trademark; the appliance's model number; and date of manufacture—are not preempted by federal law because the subsections do not "provide[ ] at any time for the disclosure of information with respect to any measure of energy consumption or water use of

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[7] Cal.Code Regs. tit. 20, § 1607(b) provides:

> Except as provided in subsection (c), the following information shall be permanently, legibly, and conspicuously displayed on an accessible place on each unit;
>
> (1) manufacturer's name or brand name or trademark;
>
> (2) model number; and
>
> (3) date of manufacture, indicating (i) year and (ii) month or smaller (e.g.week) increment. If the date is in a code that is not readily understandable to the layperson, the manufacturer shall immediately, on request, provide the code to the Energy Commission.

Id. § 1607(b).

[8] Cal.Code Regs. tit. 20, § 1607(c), titled "Exceptions to Subsection (b)," provides, in relevant part:

> (1) For plumbing fixtures and plumbing fittings, the information required by subsection (b) shall be permanently, legibly, and conspicuously displayed on an accessible place on each unit or on the unit's packaging.
>
> (2) For lamps, the information required by subsection (b) shall be permanently, legibly, and conspicuously displayed on an accessible place on each unit, on the unit's packaging, or, where the unit is contained in a group of several units in a single package, on the packaging of the group.

Id. § 1607(c).

any covered product." 42 U.S.C. § 6297(a)(1).[9] The information required to be placed on appliances under section 1607(b) and (c) is not "information with respect to any measure of energy consumption or water use" unless one expansively interprets "with respect to" and "measure of energy consumption," 42 U.S.C. § 6297(a)(1). In accordance with the presumptions informing our interpretation of express preemption provisions, we interpret these terms narrowly as such an interpretation is consistent with the statutory text.

"Measure of energy consumption" is defined as "energy use, energy efficiency, estimated annual operating cost, *or other measure of energy consumption.*" 42 U.S.C. § 6291(8) (emphasis added). We decline to interpret "other measure of energy consumption," the only relevant term left undefined in the statute, so broadly that it encompasses the information required to be placed on appliances under California's sections 1607(b) and (c). Under the maxim of statutory interpretation known as *ejusdem generis*, "or other measure of energy consumption" embraces only objects similar in nature to those enumerated by the preceding specific words. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114-15, 121 S.Ct. 1302, 149 L.Ed.2d 234 (2001). "Or other measure of energy

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[9] "Measure of energy consumption" is defined as "energy use, energy efficiency, estimated annual operating cost, or other measure of energy consumption." 42 U.S.C. § 6291(8). "Energy use" is defined as "the quantity of energy directly consumed by a consumer product at point of use . . . ." *Id.* § 6291(4). "Energy efficiency" is defined as "the ratio of the useful output of services from a consumer product to the energy use of such product . . . ." *Id.* § 6291(5). "Estimated annual operating cost" is defined as "the aggregate retail cost of the energy which is likely to be consumed annually, and in the case of showerheads, faucets, water closets, and urinals, the aggregate retail cost of water and wastewater treatment services likely to be incurred annually, in representative use of a consumer product . . . ." *Id.* § 6291(7). "Water use" is defined as "the quantity of water flowing through a showerhead, faucet, water closet, or urinal at point of use . . . ." *Id.* § 6291(31)(A).

consumption" must be construed to give effect to the terms preceding the phrase and must be defined by reference to the terms preceding it. *Id.* at 115, 121 S.Ct. 1302. Therefore, "or other measure of energy consumption" does not broaden the meaning of "measure of energy consumption," which is defined, in part, as: "the quantity of energy directly consumed by a consumer product at point of use," 42 U.S.C. § 6291(4); "the ratio of the useful output of services from a consumer product to the energy use of such product," *id.* § 6291(5); and "the aggregate retail cost of the energy which is likely to be consumed annually," *id.* § 6291(7). As such, "measure of energy consumption" does not encompass the information California requires manufacturers to place on their appliances, such as the manufacturer's name and the appliance's model number and date of manufacture.

The issue then becomes how to interpret "with respect to." The interpretation of the phrase "relates to" instructs us on how to interpret the phrase "with respect to," as both phrases are similar in scope and meaning. The Supreme Court has stated that "the term 'relate to' cannot be taken 'to extend to the furthest stretch of its indeterminancy,' or else 'for all practical purposes pre-emption would never run its course.'" *Egelhoff v. Egelhoff*, 532 U.S. 141, 146, 121 S.Ct. 1322, 149 L.Ed.2d 264 (2001) (quoting *Travelers*, 514 U.S. at 655, 115 S.Ct. 1671). The Court has also "cautioned against an 'uncritical literalism' that would make pre-emption turn on 'infinite connections.'" *Id.* at 147, 121 S.Ct. 1322 (quoting *Travelers*, 514 U.S. at 656, 115 S.Ct. 1671). As Justice Scalia observed, "[e]verything is related to everything else." *Cal. Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc.*, 519 U.S. 316, 335, 117 S.Ct. 832, 136 L.Ed.2d 791 (1997) (Scalia, J., concurring). The issue is whether the relation is "indirect, remote, and tenuous" or not. *Californians For Safe & Competitive Dump Truck Transp. v. Mendonca*, 152 F.3d 1184, 1189 (9th Cir.1998). The relation between placing a manufacturer's name, the model name, and the date of manufacture on an appliance and measures of

energy consumption, as defined in EPCA, is indirect, remote, and tenuous.

Therefore, we conclude that the marking requirements contained in sections 1607(b) and (c) of Title 20 of the California Code of Regulations are not preempted by EPCA.

We also hold that section 1607(d)(1)[10] of the California regulations is not preempted by EPCA, as the section only requires compliance with federal marking requirements and, therefore, does not require the disclosure of information that is "other than information required" under federal law. 42 U.S.C. § 6297(a)(1). As the Fourth Circuit has stated, "if state law adopts or imposes a labeling requirement that is the same as the federal standard, even if the state law provides compensation or other remedies for a violation, so long as Congress chooses not to explicitly preempt the consistent law, it will not be said to be in conflict with federal law." *Worm v. American Cyanamid Co.*, 970 F.2d 1301, 1307 (4th Cir.1992). This reasoning is supported by *Medtronic*, in which the Supreme Court stated that "[t]he presence of a [state] damages remedy does not amount to the additional or

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[10] Cal.Code Regs. tit. 20, § 1607(d)(1) provides:

(d) Energy Performance Information.

(1) Federally-Regulated Consumer Products.

The marking required by 16 C.F.R. Part 305 (2001) shall be displayed on all units of all federally-regulated consumer products of the following classes:

Refrigerators Refrigerator-freezers Freezers Central air conditioners Heat pumps Dishwashers Water heaters Room air conditioners Warm air furnaces Pool heaters Clothes washers Clothes dryers Fluorescent lamp ballasts Showerheads Faucets Water closets Urinals General service fluorescent lamps Incandescent reflector lamps Direct heating equipment Medium-base compact fluorescent lamps Cooking equipment (kitchen ranges and ovens).

Cal.Code Regs. tit. 20, § 1607(d)(1).

different 'requirement' that is necessary under the [federal] statute; rather, it merely provides another reason for manufacturers to comply with identical existing 'requirements' under federal law." 518 U.S. at 495, 116 S.Ct. 2240. Because Cal.Code Regs. tit. 20, § 1607(d)(1) merely provides appliance manufacturers another reason to comply with existing requirements under federal law, the California regulation is not preempted.

The final marking regulation Trade Associations argues is preempted by federal law, Cal.Code Regs. tit. 20, § 1607(d)(2),[11] also does not require the disclosure of information "other than information required" under federal law, and is thus not preempted. Section 1607(d)(2) requires federally-regulated commercial and industrial equipment to be marked with information. The relevant preemption provision is located at 42 U.S.C. § 6316(a)-(b), which was enacted as part of EPAct.

California regulation section 1607(d)(2) is not pre-empted because there are no federal labeling rules for the EPAct-covered equipment that are subject to California's marking requirements.[12] Where EPAct authorizes the DOE to take

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[11] Cal.Code Regs. tit. 20, § 1607(d)(2) provides:

> (d) Energy Performance Information.
>
> (2) Federally-Regulated Commercial and Industrial Equipment: Each unit of an appliance listed in Table V that is federally-regulated commercial and industrial equipment shall be marked, permanently and legibly on an accessible and conspicuous place on the unit, with the applicable energy performance information shown in Table V, and such information shall also be included on all printed material that is displayed or distributed at the point of sale.

Cal.Code Regs. tit. 20, § 1607(d)(2).

[12] The DOE has adopted labeling rules for electric motors. 10 C.F.R. § 431.83. However, the California regulations on EPAct-covered equipment do not include electric motors; they cover only space heating, air-conditioning, and water heating equipment. *See* Cal.Code Regs. tit. 20, § 1607(d)(2), Table V.

action that would preempt inconsistent state regulations, the DOE's inaction, without more, fails to preempt relevant state regulations.

Sections 6316(a) and (b) preempt "any State regulation insofar as such State regulation provides at any time for the disclosure of information with respect to any measure of energy consumption or water use . . . if . . . such State regulation requires disclosure of information . . . of any covered product *other than* information required" under federal law. 42 U.S.C. § 6297(a)(1) (emphasis added). Thus, state regulations are preempted at any time if they require the disclosure of information other than what is required under federal law.

The DOE's inaction alone cannot preempt state regulations. *See Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 503, 108 S.Ct. 1350, 99 L.Ed.2d 582 (1988). "When a comprehensive federal scheme intentionally leaves a portion of the regulated field without controls, *then* the pre-emptive inference can be drawn—not from federal inaction alone, but from inaction joined with action." *Id.* Under EPAct, the DOE must prescribe labeling rules for classes of covered equipment for which the DOE has exercised its discretion to prescribe test procedures. 42 U.S.C. § 6315(a). The DOE has not prescribed test procedures for most classes of covered equipment, and therefore has not reached the decision of whether to prescribe labeling rules. There is no indication that the DOE's inaction was a conscious and express decision under 42 U.S.C. § 6315(h)[13] to not promulgate labeling rules for EP Act-

[13] 42 U.S.C. § 6315 provides:

> The Secretary [of DOE] shall not promulgate labeling rules for any class of industrial equipment unless he has determined that—
>
> (1) labeling in accordance with this section is technologically and economically feasible with respect to such class;
>
> (2) significant energy savings will likely result from such labeling; and

covered equipment. "[I]t is essential that an agency declare, at a high degree of specificity, its intention that its *in* action preempt state law before we may assume such a desire and give it legal effect." *Baltimore & Ohio R.R. Co. v. Oberly*, 837 F.2d 108, 115 (3d Cir.1988). As the DOE has not done so, we cannot hold that Cal.Code Regs. tit. 20, § 1607(d)(2) is preempted because it requires something "other than" what federal law does.

C. Compliance and Enforcement Regulations

Lastly, Trade Associations argue that California's procedural regulations, found at Cal.Code Regs. tit. 20, § 1608, [14] that enforce the previously discussed substantive

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(3) labeling in accordance with this section is likely to assist consumers in making purchasing decisions.

42 U.S.C. § 6315(h).

[14] Cal.Code Regs. tit. 20, § 1608, provides in relevant part:

(a) General Requirements for the Sale or Installation of All Appliances. Any unit of any appliance within the scope of Section 1601 may be sold or offered for sale in California only if:

(1) the appliance appears in the most recent database established pursuant to Section 1606(c), unless the only reason for the appliance's absence from the database is its failure to comply with an applicable standard in Section 1605.1[the applicable federal efficiency standard];

(2) the manufacturer has:

(A) tested the appliance as required by Sections 1603 and 1604;

(B) marked the unit as required by Section 1607;

. . .

(b) Appliances Not in Database.

If the Executive Director determines that an appliance that is not in the database is being sold or offered for sale in California, he or she shall take appropriate legal action to restrain and discourage such sale or offering, including, but not limited to testing units of the appliance at the manufacturer's cost and seeking appropriate judicial action.

Cal.Code Regs. tit. 20, § 1608.

regulations are preempted because they impermissibly enforce federal requirements. If the Commission's substantive regulations, as we have found, are not preempted by federal law, then the Commission's relevant compliance and enforcement provisions are also not preempted. The power to regulate must include the complementary power to enforce those regulations. California's compliance and enforcement provisions are not preempted by federal law.

IV

For these reasons, we agree with the Commission that the relevant California regulations which require manufacturers to submit data about their appliances, mark their appliances, and be subjected to related compliance and enforcement rules are not preempted by federal law. We therefore reverse the district court's decision finding these regulations preempted, vacate the injunction preventing the Commission from applying these regulations, and remand for further proceedings consistent with this opinion.

REVERSED, VACATED, AND REMANDED.

Furthermore, section 1608(e)-(g) requires the Executive Director of the Commission to periodically inspect appliances sold or offered for sale in California to determine whether they conform with the relevant energy efficiency and consumption standards. Cal.Code Regs. tit. 20, § 1608(e)(1). The Commission pays the costs of the initial testing. Cal.Code Regs. tit. 20, § 1608(f). If a tested, federally-regulated appliance performs worse than what is required under the applicable federal standard, the manufacturer must pay the cost for additional testing. Cal.Code Regs. tit. 20, §§ 1608(e)(2), (g), (f). The Executive Director informs the appropriate federal agency if the appliance's performance either is at variance with the results the manufacturer reported to the applicable federal agency or is not in compliance with the federal standard. Cal.Code Regs. tit. 20, § 1608(g). A federally-regulated appliance will be removed from the Commission's database due to its failure to comply with the applicable federal standard. Cal.Code Regs. tit. 20, §§ 1605(a)(1), 1608(c)(4), (d)(2)(B), (e)(2)(C).

NOONAN, *Circuit Judge*, dissenting:

The statutes at issue, inferentially the result of negotiation and compromise, deliberately spell out what is preempted by federal law. State regulations preempted are those that require "disclosure of information with respect to the energy use, energy efficiency or water use . . . other than the information required under section 6294 of this title." 42 U.S.C. § 6297(a)(1)(B). Where federal regulations do not require disclosure of such information to the federal government, a state is expressly prohibited from requiring such disclosure to consumers or to a state authority.

The majority opinion holds that the prohibition applies only to disclosure to consumers. The holding is a radical reduction of the key statutory term. "Disclosure," *Webster's Third New International Dictionary* (3d ed.1993) informs us, is "the act or an instance of opening up to view, knowledge or comprehension." Disclosure to a state agency is as much an opening up to view of the data as disclosure to consumers would be. Congress has chosen a broad term to prevent the imposition by a state of the burden of disclosure. Just as the meaning of "disclose" is "to expose to view" or "to make known," so the substantive noun referencing such an act is so extensive that it encompasses every compulsory revelation of the relevant information. Palpably the statute is meant to preempt the state from entering the federal domain.

I do not ask for "a broad reading" of "disclosure," but for an exact reading of a broad term. Obviously where the information is going to consumers as required by 42 U.S.C. § 6294, the meaning of disclosure is narrowed by the audience referenced. But narrowing in such a context does not limit the generality of the statutory term when no special context restricts it. That Congress did not use the term "disclosure" when describing reports to DOE does not have bearing on Congress's intent when it found a single com-

pendious way to say that manufacturers need not inform either the government or consumers.

Impatience with the restraints imposed by the precise preemptive words of the statute is also manifest when the majority deals with the phrase "other than" as the phrase refers to regulations other than federal regulations. 42 U.S.C. § 6316(a), (a)(4). Where there are no federal regulations on the subject because the DOE has not promulgated any regulations, then any state regulations are "other than" those federally required. The court indulges idiosyncratic imagination in supposing that there must be federal regulations in existence for "other than" to apply. Au contraire, if nothing exists, any state regulations are other than what exists as federal regulation. The fundamental tenet of express preemption is that Congress may preclude state involvement, even where it chooses not to regulate. Through its misreading of "other than" the court has imposed a heightened burden on the manufacturers to show implied preemption, despite Congress' express statement of preemption.

The court employs a presumption against preemption—a presumption only triggered by a showing the field to be one traditionally occupied by the states. *United States v. Locke*, 529 U.S. 89, 108, 120 S.Ct. 1135, 146 L.Ed.2d 69 (2001). California alone regulates the uses at issue. California is not big enough single-handedly to generate the presumption. The fate of California's "Fleet Rules" may be augury of what is to come. *See Engine Manufacturers Ass'n v. South Coast Air Quality Management District*, 541 U.S. 246, 124 S.Ct. 1756, 158 L.Ed.2d 529 (2004).

I would affirm the judgment of the district court.

APPENDIX B[1]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

[Filed June 11, 2003]

No. CIV. S-02-2437 WBS PAN

AIR-CONDITIONING AND REFRIGERATION INSTITUTE; GAS APPLIANCE MANUFACTURERS ASSOCIATION; ASSOCIATION OF HOME APPLIANCE MANUFACTURERS; and NATIONAL ELECTRICAL MANUFACTURERS ASSOCIATION,

Plaintiffs,

v.

ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION; WILLIAM J. KEESE, Chairman; and ROBERT PERNELL, ARTHUR H. ROSENFELD, JAMES D. BOYD, and JOHN L. GEESMAN, Commissioners, in their official capacities,

Defendants.

MEMORANDUM AND ORDER

In this action for declaratory and injunctive relief, plaintiffs, four nationwide trade organizations representing manufacturers of residential and commercial appliances and equipment, allege that defendants have adopted appliance efficiency regulations that are preempted by federal legislation. On December 13, 2002, the court granted plaintiffs' motion for a preliminary injunction regarding certain of the challenged regulations. Plaintiffs now move for judgment on the

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[1] This appendix comprises the district court's Memorandum and order issuing a permanent injunction, as well as a brief Erata that the court filed on June 23, 2003.

pleadings pursuant to Federal Rule of Civil Procedure 12(c) and for final declaratory and injunctive relief.

I. Factual and Procedural Background

The energy efficiency of appliances is governed by two sets of federal legislation: (1) the Energy Policy and Conservation Act ("EPCA"), as amended by the National Appliance Energy Conservation Act of 1987 ("NAECA"), Pub. L. No. 100-12, 101 Stat. 103 (codified at 42 U.S.C. § 6291 *et seq.*); and (2) the Energy Policy Act of 1992 ("EPACT"), Pub. L. No. 102-486, 106 Stat. 2776 (codified at 42 U.S.C. § 6311 *et seq.*). NAECA contains efficiency standards, testing procedures, and labeling requirements, among other regulations, for certain residential appliances, referred to as "covered products." These include appliances such as refrigerators, room air conditioners, and fluorescent lamp ballasts. 42 U.S.C. § 6292(a) (enumerating "covered products"). EPACT contains similar regulations for certain types of industrial equipment, referred to as "covered equipment." These include certain electric motors, packaged terminal air conditioners and heat pumps, storage water heaters, and instantaneous water heaters. 42 U.S.C. § 6311(1) (defining "covered equipment"). Together, NAECA and EPACT provide the statutory framework under which the Federal Trade Commission ("FTC") and the Department of Energy ("DOE") exercise authority and promulgate regulations relating to the manufacture and marketing of appliances and equipment.

EPCA "was enacted in 1975 as part of a 'comprehensive national energy policy.'" *Natural Res. Def. Council v. Herrington*, 768 F.2d 1355, 1362 (D.C. Cir. 1985) (quoting S. Rep. No. 516, 95th Cong., 1st Sess. 116 (1975), U.S. Code Cong. & Admin. News 1975 p. 1762 (conference report)). NAECA and EPACT both contain preemption provisions. The NAECA preemption provision reads as follows:

> (1) Effective on March 17, 1987, this part supersedes any State regulation insofar as such State regulation

provides at any time for the disclosure of information with respect to any measure of energy consumption of any covered product if—

(A) such State regulation requires testing or the use of any measure of energy consumption, water use, or energy descriptor in any manner other than that provided under section 6293[2] of this title; or

(B) such State regulation requires disclosure of information with respect to the energy use, energy efficiency, or water use of any covered product other than information required under section 6294[3] of this title.

42 U.S.C. § 6297(a)(1)(A), (B). In addition, NAECA provides general rules of preemption for state energy conservation standards both before and after a federal standard becomes effective for a product.[4] 42 U.S.C. §§ 6297(b), (c). EPACT incorporates all the preemption provisions of 42 U.S.C. § 6297 and makes them applicable to "covered equipment." 42 U.S.C. § 6316.

In August 2001, the California legislature instructed defendant California Energy Commission ("CEC") to "[a]dopt and implement updated and cost-effective standards" for all appliances "whose use . . . requires a significant amount of energy on a statewide basis." Cal. Pub. Res. Code § 25553(b). By notice published on November 23, 2001, the CEC be-gan its rule-making on the regulations at issue in this case. The regulations were adopted by the CEC on February 6, 2002, and, after several revisions, approved by the California Office

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[2] 42 U.S.C. § 6293 contains provisions relating to testing procedures used in assessing appliance efficiency.

[3] 42 U.S.C. § 6294 contains provisions relating to appliance labeling.

[4] The general rules provide for certain enumerated exceptions that are not relevant to this action.

of Administrative Law on October 28, 2002. The appliance regulations were scheduled to go into effect on November 27, 2002.

On November 7, 2002, plaintiffs filed this suit for declaratory and injunctive relief. Plaintiffs' complaint sets forth eight specific challenges to the CEC regulations.

- Count One alleges that the CEC section 1607 marking requirements for NAECA "covered products" are preempted by 42 U.S.C. § 6297.
- Count Two alleges that the CEC section 1607 marking requirements for EPACT "covered equipment" are preempted by 42 U.S.C. § 6316.
- Count Three alleges that CEC section 1606 information disclosure and pre-market approval requirements are preempted by 42 U.S.C. § 6297.
- Count Four alleges that CEC sections 1604(f) and 1605.3(f) establish test procedures and efficiency standards that are preempted by 42 U.S.C § 6297(a), (b), and (c).
- Count Five alleges that CEC section 1605.1(c)(1) misrepresents federal standards with respect to four air conditioner products.
- Count Six alleges that federal law prohibits the CEC from enforcing federal requirements concerning appliance efficiency.
- Count Seven alleges that the CEC's interpretation of the term "new construction" in section 1606(H)(1)(F) is preempted as impermissibly broad.
- Count Eight alleges that the CEC's requirements unduly burden interstate commerce.

Plaintiffs moved for a preliminary injunction regarding Counts One, Two, Three, Four, and Five of the complaint. On

December 13, 2002, the court enjoined enforcement of the following regulations:

- CEC section 1607(d)(2) (marking requirements for NAECA "covered equipment");
- CEC section 1606's information disclosure and pre-market approval requirements, and the related enforcement provisions of CEC sections 1608(a) and (b); and
- CEC sections 1605.3(f) and 1604(f)(5), as they relate to under-20-gallon water heaters.

The court denied the remainder of plaintiffs' motion for preliminary injunction without prejudice on the ground that plaintiffs had not sufficiently demonstrated irreparable harm as to CEC sections 1607(b), (c), and (d)(1)(B), CEC section 1606(a)(3)(E)'s rounding rule, and CEC section 1605.1(c)(1), in light of a planned emergency rule-making session.

Subsequent to the court's issuance of the preliminary injunction, the CEC engaged in an emergency rule-making session to address the issues raised by this litigation. The CEC adopted several amendments to the regulations. Both parties agree that, as a result of the amendments, plaintiffs' challenges to CEC section 1607(d)(1)(B), which was part of Count One, and Counts Four and Five are now moot. Regarding this motion for judgment on the pleadings, therefore, the court need only address the remaining issues in Count One and Counts Two, Three, Six, Seven, and Eight.

II. Discussion

A. Applicable Legal Standard

Pursuant to Federal Rule of Civil Procedure 12(c), "[a]fter the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." "Generally, district courts have been unwilling to grant a Rule 12(c) dismissal 'unless the movant clearly establishes that no material issue of fact remains to be resolved and that he is

entitled to judgment as a matter of law.'" *Doleman v. Meiji Mut. Life Ins. Co.*, 727 F.2d 1480, 1482 (9th Cir. 1984) (quoting C. Wright & A. Miller, *Federal Practice and Procedure: Civil*, § 1368 at 690 (1969)).

The same standard applies to motions made under Rule 12(c) as applies to motions made under Rule 12(b)(6). *See* 2 James Wm. Moore et al. *Moore's Federal Practice* § 12.38 (3d ed. 2002). Therefore, on a motion for judgment on the pleadings, the factual allegations of the non-moving party are taken as true. *Doleman*, 727 F.2d at 1482 (citing *Austad v. United States*, 386 F.2d 147, 149 (9th Cir. 1967)). "Courts dismiss complaints under Rule 12(c) for either of two reasons: (1) lack of a cognizable legal theory, or (2) insufficient facts under a cognizable legal theory." *Young v. Car Rental Claims, Inc.*, _ F. Supp. 2d _, No. CV02-00770, 2003 WL 1786471, at *2 (D. Haw. March 31, 2003). When deciding a Rule 12(c) motion, the court "may consider pleadings, documents attached as exhibits or incorporated by reference in the pleadings, and matter of which the Court may take judicial notice; the Court may also consider documents not explicitly incorporated in or attached to the complaint if the complaint necessarily relies on these documents and their authenticity is not questioned." *Milne v. Slesinger*, No. CV02-08508, 2003 WL 21076983, at *3 (C.D. Cal. May 8, 2003).

Under the Supremacy Clause of the Constitution, Congress has the power to pass legislation that preempts state law. *See* U.S. Const. art. VI, cl. 2; *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000) ("A fundamental principle of the Constitution is that Congress has the power to preempt state law."). Such preemption may be either express or implied. Here, plaintiffs argue only express, not implied, preemption. Express preemption may be found where Congress has explicitly stated "the extent to which its enactments preempt state law." *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990) ("Pre-emption is fundamentally a question of congressional intent, and when Congress has made its intent known

through explicit statutory language, the courts' task is an easy one.") (internal citation omitted)).

In determining the scope of an express preemption provision, the court is guided by two presumptions. *Medtronic v. Lohr*, 518 U.S. 470, 485 (1996). First, the court presumes that "'the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *Id.* (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). Second, "'[t]he purpose of Congress is the ultimate touchstone' in every pre-emption case." *Id.* (quoting *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103 (1963)). Congressional intent is "primarily discerned from the language of the pre-emption statute and the 'statutory framework' surrounding it." *Id.* (citation omitted).

B. Plaintiffs' Claims

1. Count One: CEC § 1607 Marking Requirements for NAECA "Covered Products"

a. CEC §§ 1607(b) and (c)

Under CEC section 1608(a)(2)(B), all the marking requirements set forth in CEC section 1607 must be met for "any unit of any appliance . . . sold or offered for sale in California." CEC section 1607(b) requires that the manufacturer's name, brand name or trademark, the model number, and the date of manufacture (year and month, or smaller increment) be "permanently, legibly, and conspicuously displayed on each unit."[5] If the date is in a code that is "not readily understandable to the layperson," section 1607(b) requires manufacturers to provide the code immediately, on request, to the CEC. Section 1607(c) further provides that: (1) for plumbing fixtures and plumbing fittings, the required information be displayed on an accessible place on each unit or on the unit's

[5] The amended section 1607(b) no longer requires that this information appear on the product's nameplate.

packaging; (2) for lamps, the required information be displayed on an accessible place on each unit, or the unit's packaging, or "where the unit is contained in a group of several units in a single package, on the packaging of the group"; and (3) for fluorescent lamp ballasts, that the date of manufacture indicate year and three-month or smaller increment.

In analyzing whether these requirements are preempted, the court must begin, as it does in any statutory analysis, with the plain language of the statute. *See United States v. Hanousek*, 176 F.3d 1116, 1120 (9th Cir. 1999) ("If the language of the statute is clear, we need look no further than that language in determining the statute's meaning."). Relevant to the court's analysis of the plain language of a statute is "'the structure and purpose of the statute as a whole,' as revealed not only in the text, but through the reviewing court's reasoned understanding of the way in which Congress intended its regulatory scheme to affect business, consumers, and the law." *Medtronic*, 518 U.S. at 488.

NAECA provides, in pertinent part, for preemption of state regulations that require "the disclosure of information with respect to any measure of energy consumption or water use of any covered product if—such State regulation requires disclosure of information with respect to the energy use, energy efficiency, or water use of any covered product other than information required under section 6294 of this title." 42 U.S.C. § 6297(a)(1)(B). CEC sections 1607(b) and (c) clearly require the disclosure of information. *See* Section II(B)(3), *infra* (discussing the meaning of "disclosure of information"). Therefore, the court must determine: (1) if this disclosure of information is "with respect to any measure of energy consumption or water use" and (2) if it is, whether the disclosure of information required by the CEC regulations is "other than information required by section 6294."

On their face, CEC sections 1607(b) and (c), which require disclosure of the manufacturer's name, the model number, and the date of manufacture, do not appear to call for the disclosure of information with respect to any measure of energy consumption or water use. However, at oral argument on plaintiffs' motion for preliminary injunction, defendants stated that it was necessary to have the date of manufacture on the products to determine compliance with energy consumption standards. (Dec. 5, 2002 Hr'g Tr. at 41:22-42:14). In addition, in defendants' opposition, they state that "[a]ll of the marking requirements [in section 1607] help foster EPCA's primary goal of energy efficiency," and that "[t]he purpose of [these] regulations is to allow compliance and enforcement personnel . . . to determine quickly which efficiency standard is applicable . . . ." Therefore, because the purpose of the regulations appears to be facilitating determinations of whether products comply with energy efficiency standards, CEC sections 1607(b) and (c) do require disclosure of information with respect to any measure of energy consumption.

Thus, the court must determine whether this disclosure of information is "other than information required under section 6294." Section 6294 of NAECA provides for labeling requirements for "covered products." The requirements of NAECA, including those of section 6294, are implemented through FTC regulations. 16 C.F.R. § 305.1 (setting forth the scope of the regulations implementing NAECA).

The FTC regulations require, among other things, that the name of the manufacturer and the model number appear on the labels of most "covered products." 16 C.F.R. § 305.11(a)(5)(B), (a)(5)(C). Regarding lighting products, the FTC regulations do not require the manufacturer's name or the model number to appear on the label. 16 C.F.R. § 305.11(d), (e). The FTC regulations do not require that the labels of "covered products" include the date of manufacture. Rather, the federal regulations require that the date of manufacture be reported to the FTC whenever a new basic model is

introduced on the market, or, for fluorescent lamp ballasts, with the first submission for each basic model. 16 C.F.R. § 305.8(a)(1), (a)(2). The federal regulations also provide manufacturers with options regarding the placement of labels on "covered products" and allow the information to be displayed on a hang tag instead of an affixed label. 16 C.F.R. § 305.11(6), (7).

The requirements of CEC sections 1607(b) and (c) go beyond the federal requirements in two ways: (1) by providing that the date of manufacture be marked on "covered products" when the FTC regulations require only that this information be submitted to the FTC in certain circumstances; and (2) by providing that the manufacturer's name and model number be marked on the products themselves rather than on a label or hang tag (or in the case of lighting products not provided on a label at all), as required by the FTC regulations. Therefore, CEC sections 1607(b) and (c) require the disclosure of information "other than" what is required by section 6294 and its implementing regulations.

Accordingly, because CEC sections 1607(b) and (c) require disclosure of information with respect to any measure of energy consumption and because that disclosure is "other than" what is required by section 6294, CEC sections 1607(b) and (c)—creating marking requirements for "covered products"—are preempted under the plain language of NAECA.

b. CEC § 1607(d) (1)

CEC section 1607(d)(1) states that "[t]he marking required by 16 CFR Part 305 (2001) shall be displayed on all unites [sic] of all federally-regulated consumer products of" certain classes. Plaintiffs contend that this regulation is an impermissible attempt to enforce a federal standard. Defendants acknowledge that the CEC does not have the authority to enforce federal efficiency standards at the point of sale. *See* Section II(B)(4), *infra*, (further discussing state enforcement of federal standards). As discussed above, marking require-

ments relate to energy efficiency standards in that they facilitate compliance determinations. *See* Section II(B)(1)(a), *supra*. Under CEC section 1608(a)(2)(B), all the marking requirements set forth in CEC section 1607 must be met for appliances sold or offered for sale in California. Therefore, if a product did not comply with the federal marking requirements incorporated into CEC section 1607(d)(1), the CEC could potentially block the product's sale in California. Because such blockage would constitute impermissible enforcement of a federal standard, CEC section 1607(d)(1) is preempted.

2. Count Two: CEC § 1607 Markinq Requirements for EPACT "Covered Equipment"

CEC section 1607(d)(2) requires that "covered equipment" be marked with "applicable energy performance information shown in Table V" of the regulation. With regard to this regulation, defendants reiterate the argument they made at the preliminary injunction stage—that, because the DOE has not prescribed labeling rules for most "covered equipment," the CEC is merely filling a regulatory gap left by DOE inaction.[6] Under 42 U.S.C. § 6315, the DOE is authorized to prescribe labeling rules for classes of "covered equipment" for which a test procedure has been prescribed. The DOE's power to prescribe test procedures under EPACT is discretionary. 42 U.S.C. § 6314(a). Therefore, the lack of DOE regulations regarding the labeling of "covered equipment" is due to the fact that, currently, the DOE has not prescribed test procedures for most classes of "covered equipment."

The EPACT preemption provision states that a state regulation that provides "*at any time* for the disclosure of information with respect to any measure of energy consumption" is preempted where the required disclosure is of information

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[6] The DOE has prescribed marking requirements for electric motors. *See* 10 C.F.R. §§ 431.81, 431.83.

"other than" what is required by EPACT's labeling provision. 42 U.S.C. § 6316 (incorporating the NAECA preemption provision found in 42 U.S.C. § 6297) (emphasis added). Therefore, the statutory language does not contemplate that preemption of state regulations regarding the marking of "covered equipment" is dependent on the passage of federal regulations regarding labeling.

In addition, the touchstone of any preemption analysis is Congressional intent. *See Medtronic*, 518 U.S. at 485. As discussed above, EPCA, the statute preceding NAECA and EPACT, was enacted as part of a comprehensive national energy policy. *See* S. Rep. No. 516 (1975). Furthermore, NAECA resulted from a situation where "appliance manufacturers were confronted with the problem of a growing patchwork of differing State regulations which could increasingly complicate their design, production and marketing plans. Regulations in a few populous States could as a practical matter determine the product lines sold nationwide, even in States where no regulations existed."[7] S. Rep. No. 100-6 at 4 (1987). EPACT incorporates NAECA's preemption provisions. Thus, Congress clearly intended to create some uniformity in regulations under the EPACT regime.

Therefore, as discussed at length in the court's December 13, 2002 Order, where: (1) preemption is effective "at any time"; (2) Congress clearly intended to create a comprehensive energy policy scheme and a statute with some preemptive effect; and (3) an agency is vested with discretion in promulgating regulations, as the DOE is here, DOE inaction

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[7] Defendants state that the language regarding the "patchwork of differing state regulations" refers only to Congressional concern about potentially differing state regulations establishing efficiency standards. Even if this statement was made in the context of a discussion of efficiency standards, there is no evidence that congressional concern about the problematic situation that would be created if different states enacted different regulations was limited solely to efficiency standards.

does not create a regulatory gap that the states are free to fill as they like. Rather, in light of the circumstances listed above and the EPACT statutory framework, the decision by the DOE to forego, for the time being, promulgating test procedures and accompanying regulations for most classes of "covered equipment," implies a determination that the area is best left unregulated.[8] *See Arkansas Elec. Coop. Corp. v. Arkansas Public Serv. Comm'n*, 461 U.S. 375, 384 (1983) ("[A] federal decision to forego regulation in a given area may imply an authoritative federal determination that the area is best left *un*regulated, and in that event would have as much pre-emptive force as a decision *to* regulate." (emphasis in original)); *see also* Dec. 13, 2002 Order Section II(B)(1). Accordingly, CEC section 1607(d)(2) is preempted by EPACT.

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[8] According to a declaration submitted by defendants, the DOE drafted a final rule for test procedures for "covered equipment" in 2000 "during the course of an extensive rulemaking," but the rule has not yet been published. (Martin Supp. Decl. ¶ 20). The mere fact that a forthcoming federal rule may preempt a state rule in the future does not mean that the current state rule must "give way under the Supremacy Clause." *See Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 172 (1978). However, the fact that the DOE has engaged in rulemaking on test procedures for "covered equipment" bolsters the conclusion that the current lack of DOE regulations in this area is the result of an exercise of DOE discretion. Moreover, the preemption provisions at issue in the cases defendants cite in support of their argument that DOE inaction should have no preemptive effect are different from the preemption clause at issue here, which, the court has determined, is not dependent upon the promulgation of federal regulations. *See Toy Mfrs. of Am., Inc. v. Blumenthal*, 986 F.2d 615, 620 (2d Cir. 1993) (stating that preemption provision in the Federal Hazardous Substances Act was contingent on existence of federal regulation addressing same issues as state regulation); *New Jersey State Chamber of Commerce, v. Hughey*, 774 F.2d 587, 592 (3d Cir. 1985) (stating that OSHA's preemption provision expressly gives states the authority to regulate matters not governed by a federal standard).

3. Count Three: CEC § 1606 Information Disclosure and Pre-Market Approval Requirements

a. Information Disclosure and Pre-Market Approval Requirements

CEC section 1606 requires manufacturers to submit specified information to the CEC for each appliance offered for sale or sold in California. In particular, CEC section 1606(a), Table U, sets forth the specific information that must be submitted for various appliances, including both "covered products" and "covered equipment". The recent amendments to this regulation make the submission of some items of information contained in Table U voluntary, rather than mandatory. CEC sections 1606(a)(1)(A) and (B) provide that the CEC's executive director will specify formats and schedules for information submittal. CEC section 1606(b) then provides for a procedure by which the executive director will review the submitted statements and determine whether or not an appliance complies with CEC regulations.[9]

The parties dispute whether the phrase "disclosure of information," which is used in both the introductory and modifying clauses of section 6297, should be interpreted broadly or narrowly. Defendants contend that: (1) "disclosure of information" should be interpreted narrowly as referring only to labeling requirements and "other point of sale information disclosure to consumers"; and (2) even if the CEC regulations require "disclosure of information" within the meaning of NAECA's preemption provision, they do not require data regarding measures of energy consumption or water use. The

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[9] CEC section 1606(b)(2)(A) delineates time periods within which the executive director must inform manufacturers as to whether their products are compliant. For example, through February 28, 2004, if the manufacturer's submission of information is filed electronically, the executive director must inform the manufacturer of the determination within thirty calendar days after the receipt of the submission.

meaning of the phrase "disclosure of information" is somewhat unclear from the plain language of section 6297. Therefore, the court must look to the statutory framework to determine the meaning of this phrase. Furthermore, where the statutory language is ambiguous, the court "may look to legislative history as a guide to its meaning." *United States v. McElyea*, 158 F.3d 1016, 1018-19 (9th Cir. 1998).

The statutory and regulatory framework of NAECA contemplates disclosures of information regarding energy consumption that go beyond disclosures of information on labels. *See* Dec. 13, 2002 Order at Section II(C)(1)(a). For example, section 6296(d) of NAECA states that the DOE may require manufacturers of "covered products" to submit information or reports to the DOE regarding, among other things, energy efficiency, energy use, or water use of "covered products."[10]

In addition, the FTC regulations implementing NAECA provide both labeling requirements and requirements for the submission of data to the FTC including data regarding "the estimated annual energy consumption . . . or energy efficiency rating . . . for each basic model in current production." 16 C.F.R. § 305.8(a)(1). The FTC regulations also require the submittal of the "model numbers for each basic model; the total energy consumption, determined in accordance with § 305.5, used to calculate the estimated annual energy con-

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[10] Defendants contend that section 6296 is of "dubious relevance" to the preemption inquiry because section 6297 refers only to sections 6293 and 6294, the testing and labeling provisions of NAECA, in its modifying clauses. However, when a statutory phrase is ambiguous, the court must look to the overall statutory framework to discern the meaning of the phrase. *See Medtronic*, 518 U.S. at 488. Moreover, the provisions of section 6296 are inextricably related to those of section 6294. For example, manufacturers of "covered products" to which a rule under section 6294 applies must, upon request, "provide the data from which the information included on the label and required by the rule was derived." 42 U.S.C. § 6296(b)(2).

sumption or energy efficiency rating; the number of tests performed; and, its capacity . . . ." *Id.*

While defendants are correct that section 6294(c) refers to labels and other information provided to consumers at the point of sale, as the above discussion makes clear, NAECA and its implementing regulations encompass disclosures of information that go beyond disclosures made to consumers at the point of sale and include disclosures to federal agencies. Accordingly, the phrase "disclosure of information" cannot be read narrowly as defendants suggest. Rather, "disclosure of information" encompasses disclosures of information such as the ones required by CEC section 1606.

The court must therefore determine whether CEC section 1606 requires the disclosure of information with respect to measures of energy consumption or water use such that CEC section 1606 is preempted by NAECA. NAECA defines "measure of energy consumption" as "energy use, energy efficiency, estimated annual operating cost, *or other measure of energy consumption.*" 42 U.S.C. § 6291(8) (emphasis added). The statute defines "energy use" as "the quantity of energy directly consumed by a consumer product at point of use", and "energy efficiency" is defined as "the ratio of the useful output of services from a consumer product to the energy use of such product." 42 U.S.C. §§ 6291(4), (5).

According to defendants, taking these statutory definitions together, "section 6297(a)(1) could preempt a State regulation on 'the disclosure of information with respect to any measure of energy consumption . . . of any covered product' only if the information specifically describes *how much energy the product 'directly consume[s]'* . . . or, for measures of energy efficiency, *how much useful output the appliance produces in relationship to its energy use.*" Defendants' definition, however, ignores the "or other measure of energy consumption" language contained in the statutory definition. Moreover, as discussed in the context of the marking of "covered pro-

ducts," information that is not apparently related to measures of energy consumption, such as the date of manufacture, may still relate to compliance with measures of energy consumption. *See* Section II(B)(1)(a), *supra*.

Finally, as the court noted in its previous order, allowing each state to require manufacturers to submit different pieces of information about their products opens the door to the creation of the precise situation that Congress sought to avoid in passing NAECA—subjecting manufacturers to a patchwork of potentially inconsistent state regulations. *See* Dec. 13, 2002 Order at Section II(C)(1)(a)(i); *see also* Section II(B)(2), *supra*. Therefore, because CEC section 1606 provides for "the disclosure of information with respect to any measure of energy consumption or water use," its information-reporting requirements, and the related pre-market approval requirements in CEC section 1608(a), are preempted by NAECA.

While the DOE has not promulgated a regulatory scheme for "covered equipment" under EPACT similar to the one the FTC has promulgated under NAECA, EPACT expressly applies the NAECA preemption provision and the relevant provisions of section 6296 to "covered equipment." 42 U.S.C. §§ 6316(b)(1). As discussed in Section II(B)(2), *supra*, preemption under EPACT is not contingent on the promulgation of regulations by the DOE. Therefore, the CEC's information submittal requirements are also preempted as applied to "covered equipment."

b. The Rounding Rule

CEC section 1606(a)(3)(E) (the "rounding rule") provides rules regarding how test data required to be submitted under Table U must be reported. Because the court has determined that the information submittal requirements for "covered products" and "covered equipment" are preempted, the issue of how test data must be reported to the CEC is moot. Accord-

ingly, the court need not address whether the rounding rule is preempted.

4. Count Six: CEC Enforcement of Federal Requirements

Plaintiffs claim that the CEC cannot enforce federal requirements regarding "covered products" and "covered equipment." In particular, plaintiffs allege that the CEC regulations impermissibly allow state enforcement of federal energy efficiency standards.[11] Defendants acknowledge that, pursuant to section 6297(c),[12] the CEC does not have the authority to enforce federal efficiency standards at the point of sale, and CEC section 1608(a)(4) has been amended to clarify that the CEC cannot block the sale of a product in California based solely on the product's failure to comply with a federal standard. Therefore, the court must consider whether any of the remaining enforcement provisions in the CEC regulations are preempted.

CEC section 1608(e) sets forth provisions for the "enforcement testing of appliances." Under section 1608(e), the CEC executive director "shall periodically cause" the testing of appliances—pursuant to federal testing procedures—to determine whether these products comply with federal and state standards that are set forth in section 1605 of the regulations. If it is determined, after calculating the mean results of two tests, that a product is not compliant, that

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[11] Plaintiffs' objections to the CEC's enforcement of federal marking requirements are discussed at Section 11(B)(1)(b), *supra*.

[12] Section 6297(c), in pertinent part, provides that, with certain exceptions not relevant here, when a federal energy conservation standard becomes effective for a covered product pursuant to section 6295, "no State regulation concerning the energy efficiency, energy use, or water use of such covered product shall be effective with respect to such product . . . ." Although defendants seek to confine the limitation on their enforcement powers to enforcement at the point of sale, no such limitation is evident from the language of the statute.

product will be removed from California's database. CEC §§ 1608(e)(1), (2). In the case of a federally regulated appliance, if the test results for a product do not meet a federal standard or are at variance with what the manufacturer has reported to the DOE or the FTC, the regulations provide that the CEC shall inform the proper federal agency. CEC § 1608(g). The cost of testing, after the initial test, is borne by manufacturers.

Although the CEC regulations do not provide that products that do not comply with federal standards will be banned from sale in California, CEC section 1608 still sets up a mandatory testing regime for federally regulated appliances that results in certain negative consequences for failure to comply. Such mandatory testing requirements that are designed to ensure compliance with federal standards are not meaningfully distinguishable from the enforcement of federal energy efficiency standards. Accordingly, the enforcement provisions of CEC section 1608, as they apply to "covered products" and "covered equipment," are preempted.

5. Count Seven: The CEO's Interpretation of the Term "New Construction"

Section 6297(c)(3) contains an exception to the preemption of state regulations "concerning the energy efficiency, energy use, or water use" of a covered product if the state regulation is "in a building code for new construction . . . ." CEC section 1606(h)(1)(F) uses the term "new construction" in a section containing a statement that is required to be placed in a trade directory that can be used for any purpose the CEC database created pursuant to section 1606(c) is used for.[13] The California building code applies both to new buildings and to

[13] The relevant part of section 1606(h)(1)(F) states that a trade directory must contain a statement saying that "UNLESS INDICATED OTHERWISE, any appliance listed in this directory . . . may be sold, offered for sale, or installed in new construction in California."

any new construction in existing buildings for which a building permit is required. Cal. Code Regs. tit. 24, §§ 100(d)(2), 100(d)(3), 100(a) (2001).[14]

"New construction" is not defined by NAECA or EPACT and has not been interpreted in the implementing regulations for either statute. Moreover, the meaning of the phrase is not apparent from the text of the statutory provision in which it appears, and the parties have not cited to any relevant legislative history regarding the construction of this phrase. Plaintiffs urge the court to adopt the definition of "new construction" that has been used in other federal regulations—that "new construction" refers to the building of a new structure and/or an addition to an existing structure that increases the floor area by more than 100 percent—not to any new construction in existing buildings for which a building permit is required. *See* Pls.' P. & A.'s at 26 n.39 (citing U.S. Dep't of Housing and Urban Development regulations 24 C.F.R. § 583.5 and 24 C.F.R. § 884.01; Dep't of Veterans Affairs regulation 38 C.F.R. § 17.701; and Federal Emergency Management Agency regulation 44 C.F.R. § 9.4).

However, when passing legislation, Congress is generally presumed "knowledgeable about existing law pertinent to the legislation it enacts." *Goodyear Atomic Corp. v. Miller*, 486

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[14] In a series of related arguments, defendants contend that because plaintiffs have not shown that they have been injured or "adversely affected" by the CEC's definition of new construction: (1) plaintiffs do not have standing to assert this claim; (2) that the claim is not ripe; and (3) that the court does not have subject matter jurisdiction under 42 U.S.C. § 6306(c). Although the declarations submitted by plaintiffs do not specifically address the injury that may be caused by the definition of "new construction," plaintiffs have detailed the various burdens on manufacturers that are created by a state regulatory scheme that is different from a federal regulatory scheme. Accordingly, the court is satisfied that plaintiffs have demonstrated injury such that the court may reach the merits of plaintiffs' claim that the CEC's definition of "new construction" is preempted.

U.S. 174, 184-85 (1988) (stating that, "in the absence of affirmative evidence in the language or the history of the statute," the Court was unwilling to assume that Congress was ignorant of relevant state laws). When NAECA was passed, the California building code used the phrase "new construction" in the same context as the phrase is used in the current code. The parties dispute whether the scope of the phrase is exactly the same in the current California code as it was in the California building code that was in existence when NAECA was passed.

Regardless, plaintiffs have not demonstrated that Congress intended a more restrictive meaning of "new construction" than that contained in the California Code or that Congress was ignorant of California's use of the phrase "new construction" in its building code.[15] In light of the presumption that Congress is aware of relevant state laws when it enacts federal legislation, the court cannot determine, on the record currently before it, that California's definition of "new construction" is preempted.[16]

6. Count Eight: Burden on Interstate Commerce

Finally, plaintiffs contend that the CEC regulations at issue in this litigation constitute an impermissible burden on interstate commerce. This claim is moot as to those regulations that the court has determined are preempted. Therefore, the

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[15] Indeed, Congress was clearly aware of the existing California energy efficiency standards when it passed NAECA because it referred to them in section 6295(b)(3)(A)(ii)(I) of NAECA.

[16] In addition, as plaintiffs' citations to other federal statutes where the term "new construction" has been defined in implementing regulations evidences, the federal government is capable of specifically defining "new construction" where it wishes to do so. In the absence of any indication that Congress intended to impart a specific definition to "new construction" in the statute at issue here, the court is unwilling to write plaintiffs' definition of that phrase into the statute.

court must consider this claim only as to the California definition of "new construction."

In order to establish a claim under the dormant Commerce Clause, a party must show that: (1) "the state law or regulation in question penalizes interstate commerce" and (2) that it "does so without sufficient economic justification." *Nat'l Audubon Soc'y, Inc. v. Davis*, 307 F.3d 835, 857 (9th Cir. 2002) (citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)). Plaintiffs have advanced no arguments in support of their claim that the CEC regulations burden interstate commerce. Moreover, it is far from clear that using a broad definition of "new construction" in California penalizes interstate commerce. Accordingly, the court cannot conclude that the California definition of "new construction" violates the dormant Commerce Clause.

IT IS THEREFORE ORDERED that:

(1) plaintiffs' motion for judgment on the pleadings be, and the same hereby is, DENIED as to the term "new construction" as used in CEC section 1606(h)(1)(F) and Title 24 of the California Code of Regulations; and

(2) plaintiffs' motion for judgment on the pleadings be, and the same hereby is, GRANTED as to CEC sections 1606, 1607(b) and (c), 1607(d)(1) and (d)(2), and the related enforcement and pre-market approval provisions of CEC section 1608. Defendants are permanently enjoined from enforcing those regulations as against plaintiffs.

DATED: June 10, 2003

/s/ William B. Shubb
WILLIAM B. SHUBB
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed June 3, 2005]

No. 03-16621
D.C. No. CV-02-02437-WBS/PAN

AIR CONDITIONING AND REFRIGERATION INSTITUTE; GAS APPLIANCE MANUFACTURERS ASSOCIATION; ASSOCIATION OF HOME APPLIANCE MANUFACTURERS; NATIONAL ELECTRICAL MANUFACTURERS ASSOCIATION,

Plaintiffs-Appellees,

v.

ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION; WILLIAM J. KEESE, Chairman; ROBERT PERNELL, Commissioner; AURTHUR H. ROSENFELD, Commissioner; JAMES D. BOYD, Commissioner; JOHN L. GEESMAN, Commissioner,

Defendants-Appellants.

ORDER

Before: B. FLETCHER, NOONAN, and THOMAS, *Circuit Judges.*

The attached amended opinion is substituted for the original opinion filed by the panel. With the amendments, Judge B. Fletcher and Judge Thomas have voted to deny the petition for rehearing. Judge Noonan has voted to grant the petition for rehearing.

The petition for rehearing en banc was circulated to the entire court. No judge of the court called for a vote on the petition for rehearing en banc within the time established to do so.

The petition for rehearing and petition for rehearing en banc are DENIED.

No further petitions for rehearing will be entertained.

APPENDIX D

FEDERAL STATUTE

42 U.S.C. § 6316. Administration, penalties, enforcement, and preemption

(a) Application of certain sections to same extent and in same manner as applicable in part A

The provisions of section 6296(a), (b), and (d) of this title, the provisions of subsections (l) through (s) of section 6295 of this title, and section[1] 6297 through 6306 of this title shall apply with respect to this part (other than the equipment specified in subparagraphs (B), (C), (D), (E), and (F) of section 6311(1) of this title) to the same extent and in the same manner as they apply in part A of this subchapter. In applying such provisions for the purposes of this part—

(1) references to sections 6293, 6294, and 6295 of this title shall be considered as references to sections 6314, 6315, and 6313 of this title, respectively;

(2) references to "this part" shall be treated as referring to part A-1 of this subchapter;

(3) the term "equipment" shall be substituted for the term "product";

(4) the term "Secretary" shall be substituted for "Commission" each place it appears (other than in section 6303(c) of this title);

(5) section 6297(a) of this title shall be applied, in the case of electric motors, as if the National Appliance Energy Conservation Act of 1987 was the Energy Policy Act of 1992;

(6) section 6297(b)(1) of this title shall be applied as if electric motors were fluorescent lamp ballasts and as if

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[1] So in original. Probably should be "sections".

the National Appliance Energy Conservation Amendments of 1988 were the Energy Policy Act of 1992;

(7) section 6297(b)(4) of this title shall be applied as if electric motors were fluorescent lamp ballasts and as if paragraph (5) of section 6295(g) of this title were section 6313 of this title; and

(8) notwithstanding any other provision of law, a regulation or other requirement adopted by a State or subdivision of a State contained in a State or local building code for new construction concerning the energy efficiency or energy use of an electric motor covered under this part is not superseded by the standards for such electric motor established or prescribed under section 6313(b) of this title if such regulation or requirement is identical to the standards established or prescribed under such section.

(b) Application of certain sections with respect to certain equipment to same extent and in same manner as applicable in part A

(1) The provisions of section 6296(a), (b), and (d) of this title, section 6297(a) of this title, and sections 6298 through 6306 of this title shall apply with respect to the equipment specified in subparagraphs (B), (C), (D), (E), and (F) of section 6311(1) of this title to the same extent and in the same manner as they apply in part B of this subchapter. In applying such provisions for the purposes of such equipment, paragraphs (1), (2), (3), and (4) of subsection (a) of this section shall apply.

(2)(A) A standard prescribed or established under section 6313(a) of this title shall, beginning on the effective date of such standard, supersede any State or local regulation concerning the energy efficiency or energy use of a product for which a standard is prescribed or established pursuant to such section.

(B) Notwithstanding subparagraph (A), a standard prescribed or established under section 6313(a) of this title shall not supersede a standard for such a product contained in a State or local building code for new construction if—

(i) the standard in the building code does not require that the energy efficiency of such product exceed the applicable minimum energy efficiency requirement in amended ASHRAE/IES Standard 90.1; and

(ii) the standard in the building code does not take effect prior to the effective date of the applicable minimum energy efficiency requirement in amended ASHRAE/IES Standard 90.1.

(C) Notwithstanding subparagraph (A), a standard prescribed or established under section 6313(a) of this title shall not supersede the standards established by the State of California set forth in Table C-6, California Code of Regulations, Title 24, Part 2, Chapter 2-53, for water-source heat pumps below 135,000 Btu per hour (cooling capacity) that become effective on January 1, 1993.

(D) Notwithstanding subparagraph (A), a standard prescribed or established under section 6313(a) of this title shall not supersede a State regulation which has been granted a waiver by the Secretary. The Secretary may grant a waiver pursuant to the terms, conditions, criteria, procedures, and other requirements specified in section 6297(d) of this title.

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APPENDIX E

STATE REGULATIONS[1]

Cal. Code Regs. tit. 20, § 1606. Filing by Manufacturers; Listing of Appliances in Database.

(a) Filing of Statements.

Each manufacturer shall file with the Executive Director a statement for each appliance that is sold or offered for sale in California. The statement shall contain all of the information described in paragraphs (2) through (4) of this subsection and shall meet all of the requirements of paragraph (1) of this subsection and all other applicable requirements in this Article. For models that are in the active database before November 27, 2002, no information needs to be submitted until (i) any of the characteristics in Table V is changed or (ii) the model is discontinued.

The effective dates of this section shall be the same as the effective dates shown in Section 1605.1, 1605.2 or 1605.3 for appliances for which there is an energy efficiency, energy consumption, energy design, water efficiency, water consumption, or water design standard in Section 1605.1, 1605.2, or 1605.3. For appliances with no energy efficiency, energy consumption, energy design, water efficiency, water consumption, or water design standard in Section 1605.1, 1605.2, or 1605.3, the effective date of this section shall be January 1, 2006.

Exceptions: This subsection is not applicable to: 1. torchieres, and 2. non-commercial cooking products until, as determined by the Executive Director, there takes effect a federal standard or a federal reporting requirement for annual

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[1] The California regulations are reproduced here in their current form. These regulations have been amended since the lawsuit was instituted, but not in any way material to the issues presented here.

cooking energy consumption or for a similar measure of energy performance, and 3. power supplies, and 4. consumer audio and video equipment, and 5. refrigerators without doors and freezers without doors that are not specifically designed for display and sale of bottled or canned beverages, and 6. walk-in refrigerators and walk-in freezers, and 7. under-cabinet luminaires, and 8. low-profile ceiling fans.

(1) General Rules.

(A) Format and Categories. Each statement shall be in a format (including but not limited to computer formats) and in categories specified by the Executive Director.

(B) When Different Statements are Required. The Executive Director may establish, modify, and enforce schedules for the submittal of statements where it is reasonably necessary for orderly processing of submittals, for example when manufacturers or third parties often submit many statements simultaneously.

(C) Asterisks in Model Numbers. In filing any statement, the manufacturer may use asterisks as a substitute for letters, numbers, blanks, or other characters in the model number, provided that an asterisk (i) shall be used only for a part of the model number that does not indicate energy consumption, energy efficiency, water consumption, or water efficiency, or a design or feature affecting such efficiency or consumption; (ii) shall represent a single letter, number, blank, or other character at the asterisk's location in the model number; and (iii) shall not be used for any of the first four letters, numbers, blanks, or other characters in the model number.

(D) Different Functions. Except as provided in Section 1606(a)(1)(G), if the same appliance is sold or offered for sale as more than one type of appliance shown in Table V (for example, if the appliance can serve both water heating and pool heating functions), the manufacturer shall submit a separate statement for each appliance type. Each appliance

type for which a statement is submitted must match all the common identifiers shown in Table V.

(E) Multiple Statements. A manufacturer may file statements for more than one appliance in a single submittal to the Executive Director. If a submittal contains statements for more than one appliance, there shall be only one statement for each appliance, except as provided in Sections 1606(a)(1)(D) and 1606(a)(1)(G). The Executive Director shall allow multiple statements to be submitted on the same sheet of paper or in the same electronic file under conditions she or he determines are reasonably necessary to ensure accuracy and compatibility with the database.

(F) Split System Central Air Conditioners. The statement for split system air conditioners shall be for the combination of the compressor-containing unit and the non-compressor-containing unit most likely to represent the highest national sales volume, consistent with Section 1604(c)(3).

(G) Combination Space-Heating and Water-Heating Appliances. Manufacturers of combination space-heating and water-heating appliances shall file two statements for each such appliance. The first statement shall contain the information listed in Table V for combination space-heating and water-heating appliances, and all other information shown in Table V for "all appliances;" and the second statement shall contain the information listed in Table V for the primary function of the appliance according to the determination required by Sections 1605(e) and 1605(f), and containing all other information shown in Table V for "all appliances." Each appliance type for which a statement is submitted must match all the common identifiers shown in Table V.

(2) Manufacturer Information

(A) The name, address, telephone number, and, if available, fax number, URL (web site) address, and e-mail address of the manufacturer.

(B) The name, address, telephone number, and, if available, fax number and e-mail address of the individual to contact concerning the statement pursuant to Section 1606(a)(4). There shall be only one individual to contact for each category (box) in the "Appliance" column of Table V, except that the individual may, during his or her absence, delegate his or her duties in this regard.

(C) The name, address, telephone number, and, if available, fax number and e-mail address of the person signing the declaration pursuant to Section 1606(a)(4).

(3) Testing and Performance Information.

(A) A statement that the appliance has been tested in accordance with all applicable requirements of Sections 1603 and 1604. If Section 1604 provides more than one test method that may be used, the manufacturer shall identify which method was used.

(B) The name and address and, if available, telephone number, fax number, URL (web site) address, and e-mail address of the laboratory or other institution where the testing required by Sections 1603 and 1604 was performed.

(C) For commercial refrigerators, commercial refrigerator-freezers, commercial freezers, large storage water heaters, and plumbing fittings, the test reports upon which the manufacturer relies in filing information pursuant to paragraph (D) immediately below.

(D) The applicable information listed in Table U; provided, however, that submittal of information marked with "I" is voluntary. Where there is text in the "Permissible Answers" column, the information provided must be one of the answers shown.

Exception: This subsection (D) does not apply to any water heater (1) that is within the scope of 42 U.S.C. sections 6292(a)(4) or 6311(1)(F), (2) that has a rated storage volume

of less than 20 gallons, and (3) for which there is no federal test method applicable to that type of water heater.

(E) How Tested Data Must Be Reported.

1. For any numerical value required by Table V that is produced by a test specified in Section 1604, the reported value shall be no higher for the value for which the consumer would prefer a high number, and no lower for the value for which the consumer would prefer a low number, than the values obtained by testing; unless different specific instructions are specified in the test method specified in Section 1604.

2. For any numerical value required by Table V that is produced by calculation from measured numerical test results, the reported value shall be no higher for the values where the consumer would prefer a high number than the exact result of the calculation, and no lower than the exact result of the calculation where the consumer would prefer a low number, than the values obtained by calculating, unless different specific instructions are specified in the test method specified in Section 1604.

3. Manufacturers may report:

a. numbers higher than tested values, where the consumer would, all other things being equal, prefer lower values (or is indifferent); and

b. numbers lower than tested values, where the consumer would, all other things being equal, prefer higher values (or is indifferent).

Example: An air conditioner is tested using the appropriate test method specified in Section 1604, and the test method does not include specific instructions about the precision of reporting.

- Cooling capacity is measured as: 36,014 Btu per hour.
- For cooling capacity, consumers prefer higher values.

- The manufacturer may not report any value over 36,014 Btu per hour.
- The manufacturer chooses to report 36,000 Btu per hour.
- Electrical energy use is measured at 3,487 watts.
- For electrical energy use, consumers prefer lower values.
- The manufacturer may not report any value under 3,487 watts.
- The manufacturer chooses to report 3,500 watts.
- Using the data the manufacturer chooses to report, EER = 36,000/3,500 = 10.285714.
- For EER, consumers prefer higher values.
- The manufacturer may not report any value of EER over 10.285714 (if EER is reported with only one decimal place, the maximum value would be 10.2).
- The manufacturer chooses to report EER = 10.2 Btu per watt hour.
- If the manufacturer had chosen to report the cooling capacity as 36,014 Btu per hour, and the electrical energy use as 3,487 watts, the calculated EER would have been 36,014/3,487 = 10.328076. In this case the manufacturer could not report any value of EER over 10.328076 (if EER is reported with only one decimal place, the maximum value would be 10.3).

Table V Data Submittal Requirements

[TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE]

(4) Declaration.

(A) Each statement shall include a declaration, executed under penalty of perjury of the laws of California, that (1) all the information provided in the statement is true, complete, accurate, and in compliance with all applicable provisions of

this Article; (2) if the statement is being filed electronically, that the requirements of Section 1606(g) have been and are being complied with; and (3) for appliances for which there is an energy efficiency, energy consumption, energy design, water efficiency, water consumption, or water design standard in Section 1605.1, 1605.2, or 1605.3, that the appliance complies with the applicable standards.

(B) If the manufacturer is a corporation, partnership, or other business entity, the declaration shall be signed by an individual authorized to make the declaration and file the statement on behalf of the business entity, and the declaration shall contain an affirmation that the individual signing is so authorized.

(C) The declaration shall be submitted and maintained as follows:

1. Statements filed on paper.

a. If the statement is filed by a manufacturer, then the manufacturer shall file a wet-signed paper declaration with the Executive Director and the Executive Director shall keep the declaration.

b. If the statement is filed by a third party under Section 1606(f), then the manufacturer shall file a wet-signed paper declaration with the third party and the third party shall keep the declaration and shall provide it to the Executive Director on request.

2. Statements filed electronically.

a. If the information is filed by a manufacturer, then either:

(i) the manufacturer shall file a wet-signed paper declaration with the Executive Director and the Executive Director shall keep the declaration;

(ii) if the Executive Director has approved the use of a unique digital identifier for this purpose, the manufacturer shall include in the statement a declaration digitally signed

under Government Code 16.5 and Title 2, California Code of Regulations, Division 7, Chapter 10 (beginning with Section 22000); or

(iii) the manufacturer shall execute a wet-signed paper declaration, electronically scan and copy the declaration, include the electronic copy of the declaration with the statement filed with the Executive Director, and keep the wet-signed paper declaration and provide it upon request to the Commission; and the Commission shall keep the electronic copy of the declaration.

b. If the information is filed by a third party under Section 1606(f), then either:

(i) the manufacturer shall file a wet-signed paper declaration with the third party and the third party shall keep the declaration and shall provide it to the Executive Director on request;

(ii) if the Executive Director has approved the use of a unique digital identifier for this purpose, the manufacturer shall execute a declaration digitally signed under Government Code 16.5 and Title 2, California Code of Regulations, Division 7, Chapter 10 (beginning with Section 22000), and provide the electronic declaration to the third party; and the third party shall keep a copy of the electronic declaration and shall provide it to the Executive Director on request; or

(iii) the manufacturer shall execute a wet-signed paper declaration, electronically scan and copy the declaration, include both the wet-signed paper declaration and the electronic copy of the declaration with the electronic information provided to the third party; the third party shall include the electronic copy with information filed with the Executive Director, shall keep an electronic copy, and shall provide the wet-signed paper declaration to the Executive Director upon request; and the Executive Director shall keep a copy of the electronic declaration.

(b) Review of Statements by the Executive Director.

In this subsection, "manufacturer" also includes a third party filing a statement under Section 1606(f).

(1) Determination. The Executive Director shall determine whether a statement is complete, accurate, and in compliance with all applicable provisions of this Article, and whether the appliance for which the statement was submitted complies with all applicable standards in Sections 1605.1, 1605.2, and 1605.3.

(2) Informing Manufacturer of Determination.

(A) The Executive Director shall inform the manufacturer of the determination within these time limits:

through February 28, 2004: if the statement was filed electronically, within 30 calendar days after receipt by the Executive Director; if the statement was filed on paper, within 45 calendar days after receipt by the Executive Director; and

beginning March 1, 2004: if the statement was filed electronically, within 14 calendar days after receipt by the Executive Director; if the statement was filed on paper, within 21 calendar days after receipt by the Executive Director.

(B) The Executive Director's determination shall be sent to the manufacturer electronically if the statement was filed electronically and either electronically or on paper if the statement was filed on paper.

(3) Nature of Determination.

(A) Statement is Incomplete. If the Executive Director determines that a statement is not complete, or that the statement does not contain enough information to determine whether it is accurate or whether the appliance complies with an applicable standard, the Executive Director shall return the statement to the manufacturer with an explanation of its defects and a request for any necessary additional information. The manufacturer shall refile the statement with

all information requested by the Executive Director and with any other information it wants to file. The Executive Director shall review the refiled statement according to the time limits in Section 1606(b)(2).

(B) Statement is Inaccurate or Appliance Does Not Comply. If the Executive Director determines that the statement is inaccurate or that the appliance does not comply with an applicable standard, the Executive Director shall reject the statement and return it to the manufacturer with an explanation of its defects. The manufacturer may submit another statement for the appliance at any time.

(C) Statement is Complete and Accurate and Appliance Complies. If the Executive Director determines that the statement is complete and accurate and that the appliance complies with all applicable standards, the Executive Director shall immediately include the appliance in the database and shall so inform the manufacturer. (Section 1608(a) states that no appliance within the scope of these regulations may be sold or offered for sale in California unless the appliance is in the database.)

(c) Database of Appliance Models.

(1 Creation of Database. The Executive Director shall maintain a paper or electronic database. The database shall consist of two parts:

(A) "Active Database." The active database shall contain, at least, information on all appliances that are currently in production, for which complete and accurate statements have been received pursuant to Section 1606(a), and that have not been removed from the database pursuant to Sections 1606(d)-(h), or 1608(b)-(e).

(B) "Historical Database." The historical database shall contain, at least, information on all appliances that (1) are no longer in production, for which complete and accurate statements have been received pursuant to Section 1606(a) or

(2) all appliances that have been removed from the active database pursuant to Sections 1606(d)-(h), Section 1608(b), or 1608(c).

(2) Status of Database. The database is the directory published by the Commission within the meaning of Title 24, California Code of Regulations, Part 6, Subchapter 1, Section 100(g). The database in existence on the effective date of this paragraph is the directory referred to in this paragraph, until that existing database is modified by the Executive Director pursuant to this Article.

(3) Annual Confirmation of Database Listings. At least annually the Executive Director shall, by writing to the most recent address filed pursuant to Section 1606(a)(2)(B), request each manufacturer of an appliance listed in the database to confirm the validity, or to correct in compliance with this Article, all of the information in each of its database listings, including but not limited to the appliance's compliance with any applicable standard adopted since the most recent filing by the manufacturer. If, within 30 days after the mailing, there is any appliance for which the Executive Director has not received a reply from the manufacturer that confirms the validity of, or corrects, all of the information in the database listing, the Executive Director shall write via certified mail, to the same address. If within 30 days of the latter mailing there is no such reply, the appliance shall be removed from the database and moved into the Historical Database, and it may be presumed that the appliance is no longer in production.

(d) Assessment of Completeness, Accuracy, and Compliance of Manufacturer Statements. Notwithstanding any other provision of these regulations, the Executive Director may at any time challenge the completeness, accuracy, and compliance with the requirements of this Article, of any statement or confirmation filed pursuant to this Section. If the statement is incomplete or inaccurate, or if the Executive Director determines that the statement otherwise fails to comply with

any of the requirements of this Article, then he or she shall, ten days after providing written notice by certified mail to the person designated in Section 1606(a)(2)(B), remove the appliance from the database described in Section 1606(c).

(e) Modified and Discontinued Appliances.

(1) If any of the characteristics listed in Table U are changed, the manufacturer shall file a statement containing the identifiers listed in Table U for the appliance and updated information for all of the characteristics that have been changed. Upon receipt of such a statement, the Executive Director shall review the statement under Section 1606(b). If the statement is complete, accurate, in compliance with all applicable standards, the Executive Director shall modify the database accordingly.

(2) After any appliance has ceased being sold or offered for sale in California the manufacturer shall file a statement so stating and containing the Identifiers listed in Table U for the appliance. Upon receipt of such a statement, the Executive Director shall review the statement under Section 1606(b). If the statement is complete, accurate, and in compliance with all applicable provisions of this Article, the Executive Director shall move the appliance from the Active Database to the Historical Database.

(f) Filing by Third Parties.

(1) A third party may file on behalf of a manufacturer the information required by Sections 1606(a)(2), 1606(a)(3), 1606(a)(4), 1606(c)(3), or 1606(e) if:

(A) before or with its first submittal, and at least annually thereafter, the third party submits to the Executive Director, under penalty of perjury, persuasive evidence that:

1. the third party has read and understood all the provisions of this Article, of federal law, and of all other documents applicable to each appliance category in Subsections (a)-(t) of

Section 1601 for which the third party will file information; and

2. the third party is financially and technically capable of complying with the applicable provisions of this Article;

(B) the manufacturer submits to the third party:

1. the information that is required;

2. a declaration under penalty of perjury, and where applicable pursuant to Section 1606(a)(4)(B),

a. that the information is true, complete, accurate, and in compliance with all applicable provisions of this Article, and,

b. for appliances for which there is an energy efficiency or energy design standard in Section 1605.1, 1605.2, or 1605.3, that the model complies with the applicable standards; and

3. an authorization, filed with both the third party and the Commission, for the third party to submit the information to the Commission on behalf of the manufacturer.

(C) the third party submits to the Executive Director, in compliance with the requirements of this Article applicable to manufacturer-filed submittals:

1. the information that is required; and

2. a declaration under penalty of perjury, and where applicable pursuant to Section 1606(a)(4)(B), that:

a. to the best of the third party's knowledge and belief, the information submitted to the Commission is the same as the information submitted by the manufacturer to the third party; the information is true, complete, accurate, and in compliance with all applicable provisions of this Article; and, for appliances for which there is an energy efficiency, energy design, water consumption, or water efficiency standard in Section 1605. 1, 1605.2, or 1605.3, the appliance complies with the applicable standards; and

b. the requirements of Sections 1606(f)(1) are met;

(D) the third party has an agreement with the manufacturer that allows the third party to challenge the truth, accuracy, and completeness of information submitted by the manufacturer to the third party, and to refuse to submit to the Commission information that the third party believes is not truthful, accurate, or complete; and

(E) the third party provides, upon ten days' written notice from the Executive Director, all information provided by the manufacturer and all information relating to any challenges pursuant to Section 1606(f)(1)(D).

(2) Whether a manufacturer files information required by this Section by itself or via a third party, the manufacturer remains responsible for the truth, accuracy, completeness, and timeliness of all required filings.

(3) At any time the Executive Director may forbid a third party from making filings for a specified time, allow reinstatement subject to appropriate conditions, and remove affected appliances from the database, if he or she finds that there is noncompliance with an applicable provision of this Article.

(4) The provisions of this Article are applicable to all submittals and filings, whether made by a manufacturer directly or by a third party on behalf of a manufacturer.

(g) Electronic Filing.

(1) Unless otherwise stated in this Article, the statements and other submittals required or allowed by this Article shall be filed electronically by all third parties acting under Section 1606(f) so that:

(A) the electronic filing uses a format and characteristics, including without limitation appropriate formatting, that are specified by the Executive Director, and includes a declaration that complies with Section 1606(a)(4);

(B) within three days of the electronic filing being made, an exact paper copy of all declarations required by Sections 1606(a)(4) or 1606(f)(1)(C)(ii) is executed by a person authorized under the appropriate section to execute it;

(C) for two years from the date of filing the person making the filing keeps the exact paper copies required by paragraph (B) immediately above and provides those copies to the Executive Director upon 10 days' written request.

(2) Any electronic filing constitutes a representation by the person making the filing that:

(A) all applicable requirements of this Article have been met;

(B) the person will electronically acknowledge receipt of all electronic communications concerning the filing from the Executive Director to the person;

(C) all electronic communications concerning the filing from the Executive Director to the person shall be deemed received by the person upon notification to the Executive Director, by the computer from which the Executive Director communication has been sent, that the communication has been sent; and

(D) all electronic communications concerning the filing from the person to the Executive Director shall be deemed received by the Executive Director only upon actual receipt.

(3) At any time the Executive Director may forbid electronic filings by any person, or generically, and may remove affected appliance models from the database, if he or she finds that an applicable requirement of this Article is not being met.

(h) Trade Association Directories.

(1) A paper or electronic directory, or a part thereof, published by an appliance trade association may be used for any purpose that the database established pursuant to Section

1606(c) is used for, if the Executive Director approves the directory, or part thereof, by determining and confirming that:

(A) the trade association is an approved industry certification program for each appliance listed in the directory;

(B) all of the applicable requirements of Section 1606(f) for third party submittals are met for the directory;

(C) the entity submits to the Executive Director:

1. all of the information in the directory, within one working day of the approval of the directory;

2. all of the information in the directory that has changed since the previous submittal, at the end of each week during which there has been any change;

3. a declaration, signed under penalty of perjury of the laws of California, that to the best of the trade association's knowledge and belief:

a. the information in the directory is the same as the information submitted by manufacturers to the trade association;

b. the information is true, complete, accurate, and in compliance with all applicable provisions of this Article;

c. each appliance complies with the applicable standards in Section 1605.1; and

d. or any appliance for which there is a standard in Section 1605. 2 or Section 1605.3, that the appliance meets all applicable standards unless the directory states, in a format approved by the Executive Director (including without limitation font, type size, and placement in the directory), that it is illegal in California to sell the appliance or offer it for sale.

(D) for each appliance that is listed in a trade association directory, the directory includes all of the following information, where applicable to the appliance:

manufacturer brand model number as it appears on the appliance type fuel type voltage electrical phase capacity or other size measurement input output standby consumption, loss, or other similar measurement; and energy efficiency, energy consumption,water efficiency, or water consumption;

(E) the directory contains no appliance in the following categories:

1. an appliance that fails to meet an applicable energy efficiency, energy consumption, energy design, water efficiency, or water consumption standard established in or pursuant to NAECA or EPAct;

2. an appliance for which the manufacturer has stated or certified that the appliance meets an energy efficiency, energy consumption, energy design, water efficiency, or water consumption standard not applicable to it; or

3. an appliance that does not, or an appliance whose manufacturer does not, meet an applicable requirement of this Article, unless the directory states, in a format approved by the Executive Director (including without limitation font, type size, and placement in the directory), that it is illegal in California to sell the appliance or offer it for sale; and

(F) each directory contains the following statement, in at least 20 point bolded type and on the front cover or first page, or in another format and with other characteristics as specified by the Executive Director:

"This directory [insert parts if appropriate] has been approved by the California Energy Commission (Commission) for determining compliance with its appliance efficiency regulations (Title 20, California Code of Regulations, Sections 1601-1608) and its building standards (Title 24, California Code of Regulations, Part 6). UNLESS INDICATED OTHERWISE, any appliance listed in this directory [insert parts if appropriate] may be sold, offered for sale, or installed in new construction in California. For

appliances manufactured by manufacturers participating in this directory, but who have not given authorization for data submittal to the Commission, this directory cannot be used for determining compliance. For information about such appliances, appliances that are beyond the scope of this directory, or appliances produced by manufacturers who do not participate in this directory, please contact the Commission's Building Standards Hotline at 916-654-5106, 800-772-3300 (in California only), or <eehomes@energy.state.ca.us>. Manufacturers not granting authorization for data submittal to the Commission as of the publication date of this directory include [list all affected manufacturers]"; and

(G) at the end of each calendar quarter, the trade association mails, at no cost to recipients, a paper copy of the current directory or supplement or part thereof to the Executive Director and to all California building officials as specified by the Executive Director, and provides to the Executive Director a list of the building officials to whom the directory or supplement was sent.

(2) If the Executive Director at any time determines that an approved trade association directory does not comply with an applicable provision of this Article, or that any information in a trade association directory is substantially incomplete, inaccurate, or not in compliance with an applicable provision of this Article, then:

(A) upon written notice from the Executive Director the trade association shall immediately indicate in the directory, in a format approved by the Executive Director (including without limitation font, type size, and placement in the directory), that it is illegal in California to sell the appliance. In addition, the Executive Director shall remove the appliance from the Commission's database established under Section 1606(c) or indicate in the database that the appliance cannot legally be sold or offered for sale in California. The appliance shall be removed from, or indicated in, the Commission's database and the trade association directory, for at least sixty days,

until the end of a proceeding held to consider the matter pursuant to Sections 11445.10-11445.60 of the California Government Code (or, at the third party or affected manufacturer's option, pursuant to Sections 11425.10-11425.60 of the California Government Code); and

(B) the Executive Director may suspend or revoke the approval of the trade association directory; if approval is revoked, the trade association may not seek re-approval for two years after the revocation.

(3) If the Executive Director takes action under Sections 1606(b)(3)(A) or (B), or 1608(c), (d), or (e), he or she shall direct that all trade association directories be modified accordingly.

(4) There may be more than one third-party directory for the same appliance.

(i) Retention of Records

Manufacturers, and third parties or trade associations acting under Sections 1606(a), 1606(f), and 1606(g), shall retain all data, forms, information, and all other records required by this Article concerning each appliance (1) for at least 2 years after the manufacturer informs the Executive Director, in writing, of the cessation of production of the appliance; and (2) in a manner allowing ready access by the Executive Director on request. The Executive Director shall retain all data, forms, information, and all other records required by this Article concerning each appliance for at least 10 years after the record is initially filed or reconfirmed.

Cal. Code Regs. tit. 20, § 1607. Marking of Appliances.

(a) Scope of this Section.

Every unit of every appliance within the scope of Section 1601 shall comply with the applicable provisions of this Section. The effective dates of this section shall be the same as the effective dates shown in Section 1605.1, 1605.2 or 1605.3 for appliances for which there is an energy efficiency, energy consumption, energy design, water efficiency, water consumption, or water design standard in Section 1605.1, 1605.2, or 1605.3. For appliances with no energy efficiency, energy consumption, energy design, water efficiency, water consumption, or water design standard in Section 1605.1, 1605.2, or 1605.3, the effective date of this section shall be January 1, 2006.

(b) Name, Model Number, and Date.

Except as provided in subsection (c), the following information shall be permanently, legibly, and conspicuously displayed on an accessible place on each unit;

(1) manufacturer's name or brand name or trademark;

(2) model number; and

(3) date of manufacture, indicating (i) year and (ii) month or smaller (e.g. week) increment. If the date is in a code that is not readily understandable to the layperson, the manufacturer shall immediately, on request, provide the code to the Energy Commission.

(c) Exceptions to Subsection (b).

(1) For plumbing fixtures and plumbing fittings, the information required by subsection (b) shall be permanently, legibly, and conspicuously displayed on an accessible place on each unit or on the unit's packaging.

(2) For lamps, the information required by subsection (b) shall be permanently, legibly, and conspicuously displayed on

an accessible place on each unit, on the unit's packaging, or, where the unit is contained in a group of several units in a single package, on the packaging of the group.

(3) For fluorescent lamp ballasts, the date of manufacture information required by section 1607(b)(3) shall indicate (i) year and (ii) three-month or smaller increment. If the date is in a code that is not readily understandable to the layperson, the manufacturer shall immediately, on request, provide the code to the Energy Commission.

(d) Energy Performance Information.

(1) Federally-Regulated Consumer Products.

The marking required by 16 CFR Part 305 (2004) shall be displayed on all units of all federally-regulated consumer products of the following classes:

Refrigerators Refrigerator-freezers Freezers Central air conditioners Heat pumps Dishwashers Water heaters Room air conditioners Warm air furnaces Pool heaters Clothes washers Clothes dryers Fluorescent lamp ballasts Shower-heads Faucets Water closets Urinals General service fluorescent lamps Incandescent reflector lamps Direct heating equipment Medium-base compact fluorescent lamps Cooking equipment (kitchen ranges and ovens).

(2) Federally-Regulated Commercial and Industrial Equipment: Each unit of an appliance listed in Table W that is federally-regulated commercial and industrial equipment shall be marked, permanently and legibly on an accessible and conspicuous place on the unit, with the applicable energy performance information shown in Table W, and such information shall also be included on all printed material that is displayed or distributed at the point of sale.

Table W Requirements for Marking of Federally-Regulated Commercial and Industrial Equipment

Class	Energy Performance Information
Split system central air conditioners (on printed material only)	Cooling capacity, SEER, EER
Single package central air conditioners	Cooling capacity, SEER, EER
Split system heat pumps (on printed material only)	Cooling capacity, heating capacity, SEER, EER, HSPF, COP
Single package heat pumps	Cooling capacity, heating capacity, SEER, EER, HSPF, COP
Package terminal air conditioners	Cooling capacity, EER
Package terminal heat pumps	Cooling capacity, heating capacity, EER, COP
Warm air furnaces	Input rating, thermal efficiency
Packaged boilers	Input rating, thermal efficiency, combustion efficiency
Water heaters	Input rating, rated storage volume, measured storage volume, thermal efficiency, standby loss (%/hr), standby loss (Btu/hr)

Hot water supply boilers	Rated input, rated storage volume, measured storage volume, thermal efficiency, standby loss

(3) Air Conditioners, Heat Pumps, Furnaces, Boilers, and Water Heaters. Each unit of air conditioners, heat pumps, furnaces, boilers, and water heaters that are not subject to NAECA and that comply with the October 29, 2001 provisions in Tables 6.2.1 A through G of ASHRAE/IESNA Standard 90.1-1999 shall be marked, permanently and legibly on an accessible and conspicuous place on the unit, with a statement that the equipment complies with the 2001 requirements of ASHRAE Standard 90.1. Each unit of other air conditioners, heat pumps, furnaces, boilers, and water heaters that are not subject to NAECA and that comply with the October 29, 1999 provisions (but not with the October 29, 2001 provisions) in Tables 6.2.1 A through G shall be marked, permanently and legibly on an accessible and conspicuous place on the unit, with a statement that the equipment complies with the 1999 requirements of ASHRAE Standard 90.1.

(4) Distribution Transformers. Each unit of distribution transformers shall comply with the labeling requirements of NEMA Standard TP3-2000.

(5) Illuminated Exit Signs. Each unit of illuminated exit signs meeting the criteria of Section 1605.3(l) that are sold in California (subject to the limitations of Section 1601) shall be marked by the manufacturer with a block E inside a circle; the mark commonly referred to as "Circle E." The size of the mark shall be commensurate with other markings on the sign, but not smaller than ¼". Signs not meeting 1605.3(l) shall not be so marked.

(6) Luminaires. Each unit of torchieres and each package containing a torchiere shall be marked, permanently and legibly on an accessible and conspicuous place on the unit, in characters no less than 1/8" on the inner surface of the reflector bowl of the torchiere, and 1/4" on the packaging, "LAMPS MUST BE NO MORE THAN 190 WATTS."

(7) Ceiling Fans. Each package containing a ceiling fan whose diameter exceeds 50 inches shall be marked, permanently and legibly on an accessible and conspicuous place on the unit's packaging, in characters no less than ¼", the unit's airflow at high, medium, and low speed in CFM, and the unit's air flow efficiency in CFM/Watt at high, medium and low speed.

(8) Commercial Pre-Rinse Spray Valves. Each unit of commercial pre-rinse spray valve shall be marked, permanently and legibly on an accessible and conspicuous place on the unit, in characters no less than 1/8", the flow rate of the unit, in gallons-per minute (gpm) at 60 psi.

(9) External Power Supplies.

(i) Each power supply shall be marked on its nameplate with the appropriate numeral, specified below, if it meets or exceeds both the no-load and average active mode efficiency requirements associated with that numeral as specified below, at each test voltage and frequency value marked on its nameplate, when tested in accordance with the test method in Section 1604(u)(1).

a. "III" for those models certified under Section 1606 as complying with the standards effective January 1, 2006 in Table U-1 of this Article, but not as complying with the standards effective January 1, 2008 in Table U-2 of this Article.

~~b.~~ "IV" for those models certified under Section 1606 as complying with the standards effective January 1, 2008 in Table U-2 of this Article.

(ii) The mark shall comply with the following:

a. Format. Roman numeral: III or IV.

b. Font. Preferred Times Roman (or other plain serif fonts).

c. Size. Legible.

d. Color. Text to contrast with the nameplate background

e. Permanence. Indelible.

(10) Residential Pool Pumps.

(i) Each residential pool pump shall be marked, permanently and legibly on an accessible and conspicuous place on the unit, in characters no less than 1/4", the rated horsepower of the pump.

(ii) Each residential pool pump motor shall be marked, permanently and legibly on an accessible and conspicuous place on the unit, in characters no less than 1/4", the total horsepower of the motor.

The following standards are incorporated by reference in Section 1607.

Number	Title
FEDERAL MARKING REQUIREMENTS CFR, Title 16, Part 305 (2004)	

Copies available from: Superintendent of Documents
U.S. Government Printing Office
Washington, D.C. 20402
www.access.gpo.gov/nara/cfr

AMERICAN SOCIETY OF HEATING, REFRIGERATING AND AIR-CONDITIONING ENGINEERS (ASHRAE)

ANSI/ASHRAE 90.1-1999	Energy Standard for Buildings Except Low-Rise Residential Buildings

Copies available from:

American Society of Heating, Refrigerating and Air-Conditioning Engineers
1791 Tullie Circle N.E.
Atlanta, GA 30329
www.ashrae.org
Phone: (800) 527-4723 (U.S./ Canada) or (404) 636-8400
FAX: (404) 321-5478

NATIONAL ELECTRIC MANUFACTURERS ASSOCIATION (NEMA)

NEMA TP3-2000	Standard for the Labeling of Distribution Transformer Efficiency

Copies available from:

National Electric Manufacturers Association
1300 N. 17th Street,
Suite 1847
Rosslyn, VA 22209
www.nema.org
Phone: (703) 841-3200
FAX: (703) 841-3300

Cal. Code Regs. tit. 20, § 1608. Compliance, Enforcement, and General Administrative Matters.

(a) General Requirements for the Sale or Installation of All Appliances. Any unit of any appliance within the scope of Section 1601 may be sold or offered for sale in California only if:

(1) the appliance appears in the most recent database established pursuant to Section 1606(c), unless the only reason for the appliance's absence from the database is its failure to comply with an applicable standard in Section 1605.1;

(2) the manufacturer has:

(A) tested the appliance as required by Sections 1603 and 1604;

(B) marked the unit as required by Section 1607;

(C) for any appliance for which there is an applicable standard in Section 1605.2 or 1605.3, certified under Section 1606(a) that the appliance complies with the standard;

(3) the unit has the same components, design characteristics, and all other features that affect energy or water consumption or energy or water efficiency, as applicable, as the units that were tested under Sections 1603 and 1604 and for which information was submitted under Section 1606(a); and

(4) for any appliance for which there is an applicable standard in Section 1605.2 or 1605.3, the unit complies with the standard.

Exceptions: Subsections 1608(a)(1) and 1608(a)(2)(c) are not applicable to: 1. torchieres, and 2. non-commercial cooking products until, as determined by the Executive Director, there takes effect a federal standard or a federal reporting requirement for annual cooking energy consumption or for a similar measure of energy performance, and 3. power

supplies, and 4. consumer audio and video equipment, and 5. refrigerators without doors and freezers without doors that are not specifically designed for display and sale of bottled or canned beverages, and 6. walk-in refrigerators and walk-in freezers, and 7. under-cabinet luminaires, and 8. low-profile ceiling fans.

(b) Appliances Not in Database.

If the Executive Director determines that an appliance that is not in the database is being sold or offered for sale in California, he or she shall take appropriate legal action to restrain and discourage such sale or offering, including, but not limited to testing units of the appliance at the manufacturer's cost and seeking appropriate judicial action.

(c) All Appliances: Submittal of Reports of Manufacturers' Certification Testing.

(1) For any appliance, the Executive Director may at any time request from a manufacturer a copy of the test report that describes the results of the testing that was performed pursuant to Section 1604 and that provides the basis for the information submitted under Section 1606(a)(3)(D). The request shall be sent to the address or e-mail address designated in Section 1606(a)(2)(B). If the appliance is a commercial refrigerator, commercial refrigerator-freezer, commercial freezer, large storage water heater, or plumbing fitting, or if the Executive Director includes with the request information that, in his or her opinion, constitutes substantial evidence that the appliance or the manufacturer is not in compliance with an applicable provision of this Article, or that the energy or water performance of the appliance is not as certified under Section 1606(a)(3)(D) or is not as required by an applicable standard in Section 1605.1, 1605.2, or 1605.3, then the manufacturer shall provide a copy of the applicable test report to the Executive Director within 5 days of the manufacturer's receipt of the request.

(2) If the Executive Director does not receive the test report within the required time, the Executive Director shall remove the appliance from the database.

(3) If the test report indicates that the energy or water consumption of the appliance is greater than, or the energy or water efficiency of the appliance is less than, the consumption or efficiency certified by the manufacturer pursuant to Section 1606(a)(3)(D), the Executive Director shall, after providing written notice by certified mail to the person designated in Section 1606(a)(2)(B), modify the listing of the appliance in the database to reflect accurately the test report.

(4) If the test report indicates that the appliance model does not comply with an applicable standard in Section 1605.1, 1605.2, or 1605.3, the Executive Director shall, ten days after providing written notice by certified mail to the person designated in Section 1606(a)(2)(B), remove the model from the database.

(d) Inspection by the Executive Director of Appliances Subject to Energy Design and Water Design Standards, and Marking Requirements.

(1) The Executive Director shall periodically inspect appliances sold or offered for sale in the state, to determine whether they conform with the applicable energy design and water design standards of Sections 1605.1, 1605.2, and 1605.3, and with the applicable marking requirements of Section 1607.

(2) Inspection of an appliance shall consist of inspection of one unit.

(A) If the inspection indicates that the unit complies with the applicable energy or water design standards and marking requirements, the matter shall be closed.

(B) If the inspection indicates that the unit does not comply with an applicable energy or water design standard or as applicable marking requirement, the Commission shall

undertake a proceeding pursuant to Sections 11445.10-11445.60 of the California Government Code (or, at the manufacturer's option, pursuant to Sections 11425.10-11425.60 of the California Government Code). If the Commission confirms the Executive Director's determination, then he or she shall remove the appliance from the database.

(e) Executive Director's Enforcement Testing of Appliances Subject to Energy Efficiency, Energy Consumption, Water Efficiency, and Water Consumption Standards.

The Executive Director shall periodically cause, at laboratories meeting the criteria of Section 1603(a), the testing of appliance units sold or offered for sale in the state, to determine whether the appliances conform with the applicable standards in Sections 1605.1, 1605.2, and 1605.3, and to determine whether their performance is as reported or certified by the manufacturer pursuant to Section 1606(a). Within ten working days of receipt of a request from any person that such testing be done, the Executive Director shall inform the person of the estimated cost of the testing. Testing shall be performed as follows:

(1) Initial Test. The Executive Director shall perform an initial test on one unit, using the applicable test procedure specified in Section 1604. Upon completion of the initial test, the Executive Director shall make a determination as follows:

(A) Performance Is No Worse Than Required by Standards and Is No Worse Than as Certified by Manufacturer. If the initial test result indicates that the energy and water consumption of the unit is no greater than, and the energy and water efficiency of the unit is no less than, the consumption or efficiency that is permitted and required by all applicable standards in Section 1605.1, 1605.2, or 1605.3, and that was certified by the manufacturer pursuant to Section 1606(a), the matter shall be closed.

(B) Performance Is Worse Than Required by Standard or Is Worse Than as Certified by Manufacturer. If the initial test

result indicates that the energy or water consumption of the unit is greater, or the energy or water efficiency of the unit is less, than the consumption or efficiency that is permitted or required by any applicable standard in Section 1605.1, 1605.2, or 1605.3, or that was certified by the manufacturer pursuant to Section 1606(a), the Executive Director shall perform a second test on a second unit, using the applicable test procedure specified in Section 1604.

(2) Second Test; Mean of Results. If a second test is performed, the Executive Director shall calculate the mean of the results of the initial test and the second test. Upon completion of the second test, the Executive Director shall inform the manufacturer of the results and shall make a determination as follows:

(A) Performance Is No Worse Than Required by Standards and Is No Worse Than as Certified by Manufacturer. If the two test results indicate that the mean energy and water consumption of the two units is no greater than, and the mean energy and water efficiency of the two units is no less than, the consumption and efficiency permitted or required by all applicable standards in Section 1605.1, 1605.2, or 1605.3, and that was certified by the manufacturer pursuant to Section 1606(a), the matter shall be closed.

(B) Performance is As Required by Standard but is Worse Than as Certified by Manufacturer. If the two test results indicate that the mean energy or water consumption of the two units is greater than, or the mean energy or water efficiency of the two units is less than, the consumption or efficiency that was certified by the manufacturer pursuant to Section 1606(a), but that the mean result nevertheless complies with all applicable standards in Section 1605.1, 1605.2, or 1605.3, the Commission shall undertake a proceeding pursuant to Sections 11445.10-11445.60 of the California Government Code (or, at the manufacturer's option, pursuant to Sections 11425.10-11425.60 of the California Government Code). If the Commission determines

that the two test results indicate that (1) the mean energy or water consumption of the two units is greater than, or the mean energy or water efficiency of the two units is less than, the consumption or efficiency as reported or certified by the manufacturer pursuant to Section 1606(a), and (2) the mean result nevertheless complies with all applicable standards in Section 1605.1, 1605.2, or 1605.3, then the Executive Director shall modify the listing of the appliance in the database to reflect accurately the Commission's determination.

(C) Performance is Not As Required by Standard. If the two test results indicate that the mean energy or water consumption of the two units is greater than, or the mean energy or water efficiency of the two units is less than, any applicable standard in Section 1605.1, 1605.2, or 1605.3, the Commission shall undertake a proceeding pursuant to Sections 11445.10-11445.60 of the California Government Code (or, at the manufacturer's option, Sections 11425.10-11425.60 of the California Government Code). If the Commission determines that the mean energy or water consumption of the two units is greater than, or the mean energy or water efficiency of the two units is less than any applicable standard, the Executive Director shall remove the appliance from the database established pursuant to Section 1606(c).

(3) Optional Method of Determining Energy or Water Performance. If, at any time before a Commission determination under Section 1608(d)(2)(B) or 1608(e)(2)(C), the manufacturer so chooses, instead of using the mean-of-two-units approach set forth in Sections 1608(e)(1) and 1608(e)(2), the Executive Director shall test the appliance using the sampling method set forth in 10 CFR Part 430, Appendix B to Subpart F (2004), and shall make the determinations under Sections 1608(e)(1) and 1608(e)(2) based on those test results. The manufacturer shall pay for all such testing.

(f) Costs.

Except as otherwise provided in this Article, all costs of initial tests showing results as described in Section 1608(d)(2)(A) shall be borne by the Commission. All costs of all other tests shall be paid by the manufacturer.

(g) Federally-Regulated Appliances.

If:

(1) the appliance tested is a federally-regulated consumer product or federally-regulated commercial and industrial equipment; and

(2) either:

(A) the test results show that the appliance does not comply with an applicable federal standard or other applicable federal requirement; or

(B) the test results are at variance with the results reported by the manufacturer to the U.S. Department of Energy or the U.S. Federal Trade Commission; then, in addition to taking the applicable actions described in Sections 1608(e)(1) and 1608(e)(2), the Executive Director shall inform the appropriate federal agency.

(h) Forms and Formats Specified by Executive Director.

The Executive Director may specify, and require the use of, any particular form or format for the submittal of any data, reports, or other information required by this Article, including but not limited to computer programs or formats.

(i) Executive Director Determinations.

Whenever this Article refers to a finding, conclusion, or other determination by the Executive Director, any person seeking such a determination shall submit to the Executive Director a written request. Within 10 days of receipt of a request, the Executive Director shall either find the request is complete and so inform the applicant, or return the request to the

applicant with a statement of what additional information is necessary to make it complete. Within 21 days of receipt of a complete request, the Executive Director shall make a determination, which shall be within the discretion of the Executive Director acting on the basis of the entire record, which shall be assembled and made publicly available by the Executive Director. Within 10 days of a determination, whether made in response to a request or made on the Executive Director's own initiative, any affected person, including but not limited to the person, if any, who made a request for the determination, may appeal the determination to the Commission in writing. At the same time that the appeal is filed, the appellant shall file all the evidence the appellant wishes the Commission to consider. The Commission Staff and any affected person shall file all the evidence they wish the Commission to consider within 20 days after the appeal is filed. The Commission shall hear and decide the appeal at the next regularly-scheduled business meeting that is at least 30 days after the appeal is filed. At the hearing the Commission may require the filed evidence to be presented under oath and may allow questions and cross-examination from participants.

The following standards are incorporated by reference in Section 1608.

Number	Title
FEDERAL SAMPLING METHOD	
CFR, Title 10, Part 430, Appendix B to Subpart F (2004)	

Copies available from: Superintendent of Documents
U.S. Government Printing Office
Washington, DC 20402
www.access.gpo.gov/nara/cfr

Supreme Court, U.S.
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In The Supreme Court of the United States

AIR CONDITIONING & REFRIGERATION INSTITUTE, *et al.*,

Petitioners,

v.

ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether the court of appeals correctly held that 42 U.S.C. § 6297(a)(1) does not preempt state regulations that require appliance manufacturers to submit data to a state agency and to mark appliances with certain information, because data submitted to a government agency rather than presented to consumers at the point of sale or use does not constitute "disclosure of information," and the required information for marking is not a "measure of energy consumption" that is "other than" that required by federal law, as those terms are used in § 6297(a)(1).

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OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondents Energy Resources Conservation and Development Commission of the State of California ("Commission"), and the individual Commissioners thereof, respectfully request that this Court deny the petition.[1]

STATEMENT

1. Created in 1974, the Commission is California's primary energy policy and planning agency. *See* Cal. Pub. Res. Code §§ 25000-25986. The Commission's duties include promoting energy efficiency through appliance and building standards. *Id.* § 25402(a)-(c). The Commission's appliance regulations have four substantive requirements:

> test methods that measure the energy performance of appliances, 20 Cal. Code Regs. tit. 20, §§ 1603-04;
>
> efficiency standards that regulate how much energy appliances may use, *id.* §§ 1605-1605.3;
>
> data-submittal by manufacturers, *id.* § 1606 & tbl.V[2]; and
>
> marking of appliances, *id.* § 1607.

---

[1] In filing this Brief in Opposition, the Commission itself, as opposed to the Commissioners sued in their official capacities, does not waive its sovereign immunity under the Eleventh Amendment. *Verizon Maryland, Inc. v. Pub. Serv. Comm'n of Maryland*, 535 U.S. 635, 645 (2002).

[2] In the opinions below, Table V is referred to as "Table U"; its designation was subsequently amended.

Petitioners here challenge only the data-submittal and marking regulations.

The Commission first adopted data-submittal regulations in 1977. Since then, appliance manufacturers have complied without apparent difficulty, as there never was a judicial challenge until this litigation was filed in late 2002.[3]

2. Shortly after the Commission was created, in 1975 Congress enacted the Energy Policy and Conservation Act ("EPCA"), Pub. L. No. 94-163, 89 Stat. 871 (1975). EPCA, which Congress has since amended on several occasions,[4] provides federal executive branch agencies with various authorities relating to energy production and conservation, including the energy efficiency of major appliances, *see* 42 U.S.C. §§ 6293-95, 6313-15. Since its enactment, EPCA has also included an express preemption provision, *id.* § 6297(a)(1). That Section preempts specified types of state "testing and labeling requirements," including the "disclosure of information with respect to any measure of energy consumption or water use of any covered product if" the state regulations require "testing," the use of a "measure of energy consumption," or "disclosure of information," that is "other than" what is provided or required under EPCA.

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[3] See Decl. of Valerie T. Hall in Supp. of Defs.' Mem. of P. & A. in Opp. to Pls.' Mot. for Prelim. Inj. (Nov. 18, 2002) (hereinafter "Hall Decl."), at ¶ 5 & tbl.1, No. CIV S 02-2437 WBS PAN (E.D.Cal.); Suppl. Decl. of R. Michael Martin at ¶¶ 9, 22 & App. ("hereinafter "Martin App.") (included in Defs.' Opp. To Pls.' Mot. for J. on the Pleadings (May 6, 2003), No. CIV S 02-2437 WBS PAN (E.D.Cal.)).

[4] *See, e.g.*, Pub. L. No. 95-619, 92 Stat. 3206 (1978); Pub. L. No. 100-12, 101 Stat. 103 (1987); Pub. L. No. 102-486, 106 Stat. 2776 (1992); Pub. L. No. 109-58, 119 Stat. 594 (2005).

3. Petitioners, four associations of appliance manufacturers, filed a complaint in federal district court seeking a permanent injunction against enforcement of the Commission's appliance data-submittal and marking regulations on federal preemption grounds. The district court granted injunctive relief, Pet. App. 23a-44a, and the court of appeals reversed, Pet. App. 1a-20a.

The appellate court concluded that § 6297(a)(1) does not preempt the data-submittal regulations because "disclosure of information," within the meaning of that Section, "only refers to consumer-directed labeling at [the] point of sale or use," not to data-submittal to the states. Pet. App. 12a. The court also concluded that the challenged appliance-marking regulations are not preempted. *Id.* 13a-20a. The court reasoned that the regulation requiring all appliances to be marked with the manufacturer's name (or brand name or trademark), the model number, and the date of manufacture is not preempted because such data is not "with respect to any measure of energy consumption," within the meaning of § 6297(a)(1). *Id.* 13a-16a. The court also held that the regulation requiring marking of "commercial and industrial equipment" with basic energy data is not preempted because it does not require information "other than information required under [federal law]," § 6297(a)(1)(B). *Id.* 17a-19a.

REASONS FOR DENYING THE PETITION

The decision below does not present an important issue of federal law, it does not conflict with any decision of any other court, and it correctly rejected petitioners'

preemption claim. The petition should, accordingly, be denied.

1. The decision below does not present an important issue of federal law warranting this Court's review. Petitioners' preemption claim rests entirely on the meaning of a statutory provision, 42 U.S.C. § 6297(a)(1), that Congress enacted three decades ago and that has remained unchanged, in any significant manner relevant to this case, since then. *Compare* 42 U.S.C. § 6297(a)(1) *with* Pub. L. No. 94-163, sec. 327(a)(1), 89 Stat. 871, 926-27 (1975) ("This part supersedes any State regulation . . . provid[ing] for – [¶] (1) the disclosure of information with respect to any measure of energy consumption of any covered product. . . . [¶] if there is a rule under section [6294] applicable to such covered product and such State regulation requires disclosure of information other than information disclosed in accordance with such rule. . . ."). Yet this case is the very first time that any court has construed the meaning of § 6297(a)(1), even though the Commission imposed many of the data-submittal requirements as long ago as 1977.

The complete absence of any other litigation, in California or any other state, raising this same claim should, standing alone, be preclusive of the merits of the petition. A petition that presents a statutory construction issue that has been raised only once during the thirty years of the statute's existence cannot possibly present the "compelling reasons" or "important federal question"

necessary under this Court's rules for a grant of certiorari. Sup. Ct. R. 10.[5]

2. Notwithstanding the absence of any other cases construing § 6297(a)(1), petitioners gamely insist that this case presents a circuit conflict. Pet. 14-21. They do so by proposing the existence of an abstract conflict concerning one particular part of the "interpretive methodology," Pet. 13, used in construing express preemption provisions in federal statutes – the "presumption against preemption." That invented conflict, however, does not support this Court's review.

Contrary to petitioners' assertion, the court below in no manner overrode the "plain meaning" of § 6297(a)(1) with a "presumption against preemption." In the first place, both the district court and the court of appeals concluded that the key statutory term – "disclosure of information" – has no "plain meaning"; rather, it is ambiguous. Pet. App.

---

[5] The absence of any litigation also belies petitioners' exaggerated claims, Pet. 23-24, of the alleged harm caused by the Commission's regulations. With regard to the data-submittal regulations, the burdens about which petitioners complain are mainly related to requirements not even at issue in this case, such as those directed to appliances outside the scope of federal law or to data items whose submittal is voluntary; others merely refer to data items that are produced during the federal tests, for which obviously there is no burden. *See* Cal. Code Regs. tit. 20, §§ 1602(f), 1603 (Exception), 1605.3(f)(1)-(2), 1606(a)(3)(D) & tbl.V; Hall Decl., *supra* n.3, at ¶¶ 13-16 & tbls.1, 3; Martin App., *supra* n.3. Similarly, most of petitioners' complaints about the marking regulations are based on the claimed need to change manufacturers' "date codes" or to re-mark units that have been shipped from the factory, but not sold, before the regulations take effect. But the regulations allow the use of *any* date code, § 1607(b)(3), (c)(3), and each provision of the regulations applies *only* to units manufactured after the provision's effective date, § 1601, 1st para., so any unit shipped before the effective date of a marking provision would not have to be re-marked.

6a, 37a. Petitioners agreed with this characterization in the courts below. *E.g.*, Pls.-Appellees' Br. 20 (Jan. 6, 2004), 2004 WL 297736.

Furthermore, in assessing the merits of petitioners' preemption claim, the appellate court did just what courts routinely do in such cases: discern congressional intent by carefully analyzing the statutory language, Pet. App. 7a, the statutory structure, *id.* 7a-8a, relevant federal regulations, *id.* 8a n.5, and the legislative history, *id.* 8a-12a. Relying on all of those factors, the court concluded that the term "disclosure of information" in § 6297(a)(1) does not preempt the kinds of state data-submittal requirements at issue here, which do not call for "disclosure of information" to consumers, but instead require only the submittal of data to a state agency with regulatory authority over the relevant products. Pet. App. 6a-12a. The court used similar, ordinary tools of statutory interpretation to reject the preemption claims concerning the marking regulations. *Id.* 13a-20a.

In reality, then, what petitioners characterize as a case presenting some kind of transcendental circuit court dispute over "interpretive methodology" is no more than a garden-variety case of statutory construction. No doubt there are some incidental differences in wording in federal appellate opinions concerning the precise implementation of this Court's oft-repeated declaration that "'*we start with the assumption* that the historic police powers of the States were not to be superseded . . . unless that was the clear and manifest purpose of Congress.'" *United States v. Locke*, 529 U.S. 89, 108 (2000) (emphasis added) (*quoting Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). One would hardly expect the exact same words to be used in opinions applying a wide variety of preemption schemes

(including not only differences in statutory language but differences among express, field, and conflict preemption theories) to a wide variety of state laws; as this Court has stated, there are "different approaches ... in various contexts." *Id.*, 529 U.S. at 107-08. But, apart from the petition in this case, no one has ever supposed that such differences in wording rise to the level of a circuit conflict presenting a distinct, important legal issue warranting this Court's review. Tellingly, no judge in any of the cases upon which petitioners rely – and not even the dissent below – has ever suggested that a circuit conflict exists.

3. The decision below is correct. Initially, in describing a "presumption against preemption," Pet. App. 4a, the court of appeals did no more than apply this Court's admonition that "[c]onsideration under the Supremacy Clause *starts with the basic assumption* that Congress did not intend to displace state law." *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981) (emphasis added). This Court has never intimated that the federalism concerns underlying that admonition disappear whenever a preemption case involves the construction of an express statutory preemption provision, especially where, as here, the provision is ambiguous. Nor has this Court (or any other court) held that the kind of state law at issue here falls outside a state's traditional and historic police powers. Indeed, the states' police powers have long been recognized as including both acquiring data from manufacturers about their products, *e.g. Corn Products Refining Co. v. Eddy*, 249 U.S. 427, 431-32 (1919), and the regulation of electricity and natural gas utilities, *e.g.*, *Ark. Elec. Coop. Corp. v. Ark. Pub. Serv. Comm'n*, 461 U.S. 375, 377 (1983), which in California includes provision of energy efficiency services, *e.g.*, Cal. Pub. Util. Code §§ 399(c)(3), 701.1(a).

In any event, the court of appeals did not rest its ruling on the "presumption against preemption." While the court noted that the presumption supported a narrow reading of § 6297(a)(1), Pet. App. 7a, the court did not end its analysis there. The court went on and independently applied traditional "rules of statutory construction" as it assessed the statutory language, the structure and purpose of the statute as a whole, applicable federal regulations, and the relevant legislative history, ultimately concluding that the California regulations are not preempted. Pet. App. 7a-20a.

Thus in upholding the data-submittal regulations, the lower court relied on the key fact that the term "disclosure of information," in the first paragraph of § 6297(a)(1), is used in other contexts within EPCA where it clearly contemplates *only* disclosures made directly to consumers at the point of sale or use. Pet. App. 7a-8a (citing 42 U.S.C. §§ 6294, 6296(d), 6297(a)(1)(B)). For example, § 6297(a)(1)(B) preempts state regulations that require the "disclosure of information ... other than information required under section 6294...." Such "disclosure of information" is, on the face of § 6294, limited to consumer disclosures at the point of sale or use. § 6294(c)(3) ("displayed in a manner ... likely to assist consumers in making purchasing decisions"), (c)(4) ("displayed or distributed at the point of sale"), (c)(5) ("attach[ed] to ... or ... ship[ped] with the product [to] assist consumers in making purchasing decisions or in using such product").

The court also relied on the fact that both EPCA, and the Federal Trade Commission ("FTC") regulations adopted thereunder, carefully distinguish between consumer disclosures and data-submittal to the government. "When Congress referred to the submittal of data to a

governmental entity in EPCA, it used the phrase 'submit information or reports,' not 'disclosure of information.'" Pet. 8a (citing § 6296(d)). Similarly, "FTC regulations, like EPCA, use 'disclosure' to refer to consumer-directed labeling and 'submission' or 'submit' to refer to data-submittal to the government." Pet. App. 8a n.5 (citing 16 C.F.R. Part 305); *see also* 54 Fed. Reg. 28,031, 28,032-33 (July 5, 1989) (FTC stating, during a rulemaking proceeding, that § 6297(a)(1) "is referring to . . . disclosures on a . . . label, not to information-reporting requirements"). The court further described at length how EPCA's legislative history indicated that Congress intended to preempt state regulations on efficiency standards, testing, and labeling, but not on data-submittal. *Id.* 8a-12a.[6]

---

[6] Additional rationales, briefed below, *e.g.*, Appellants' Opening Br. at 21-22, 26-31 & n.8, 2003 WL 23207548 ("App.Op.Br."), but not addressed by the court, support the conclusion that data-submittal is not "disclosure of information." First, under § 6297(a)(1)(A) states may adopt the federal test methods as their own. *Compare* 42 U.S.C. § 6297(a)(1)(A) *with id.* § 6297(b)-(c). Therefore, the California data-submittal requirements are independently valid, because Department of Energy ("DOE") and FTC regulations require manufacturers to submit all data produced during the federal tests upon request, 10 C.F.R. § 430.62(d) (2005); 16 C.F.R. § 305.15(b) (2005) – just as California does, *see* Cal. Code Regs. tit. 20, §§ 1604, 1606 tbl.V; Martin App., *supra* n.3. Second, preemption of data-submittal regulations in § 6297(a)(1) would be inconsistent with § 6297(e) and (f). Those provisions exempt from preemption, and thereby encourage, state procurement standards that are more stringent than federal law and specified types of state building standards, but if states were unable to require manufacturers to submit relevant data, it would be very difficult to implement such standards. Respondents also demonstrated that the data-submittal regulations are not preempted because they do not call for "any measure of energy consumption" that is "other than" what is required under federal law, 42 U.S.C. § 6297(a)(1). App.Op.Br. at 34-42. Finally, respondents showed that the challenged marking regulations do not call for the "disclosure of information" or for "any measure of energy consumption." *Id.* at 44-47.

The court of appeals also correctly upheld the challenged appliance-marking regulations. With regard to the requirement that appliances be marked with the manufacturer's name (or brand name or trademark), the model number, and the date of manufacture, Cal. Code Regs. tit. 20, § 1607(b)-(c), the court stated that because those factors have only an "indirect, remote, and tenuous" relation to "measure[s] of energy consumption," within the meaning of 42 U.S.C. § 6297(a)(1), the regulation is not preempted. Pet. App. 15a-16a. With regard to the requirement that "commercial and industrial equipment" be marked with basic energy performance data, Cal. Code Regs. tit. 20, § 1607(d)(2), the court held that even though the regulation calls for "measure[s] of energy consumption," 42 U.S.C. § 6297(a)(1), it is not preempted, because there are no federal labeling rules for such equipment and therefore the regulation is not "other than" what is required under federal law, within the meaning of § 6297(a)(1)(B). Pet. App. 16a-19a. The court explained that "[w]here [federal law] authorizes the DOE to take action that would preempt inconsistent state regulations, the DOE's inaction, without more, fails to preempt. . . ." Pet. App. 17a-18a; *see also Hawkins v. Leslie's Pool Mart, Inc.*, 184 F.3d 244, 253-54 (3d Cir. 1999); 69 Fed. Reg. 61,916, 61,222 (Oct. 21, 2004) (DOE stating that adoption of test methods, without labeling rules, for commercial and industrial equipment does not preempt state law).

Nothing in *Engine Mfrs. Ass'n v. South Coast Air Quality Mgmt. Dist.*, 541 U.S. 246 (2004) ("*EMA*"), casts any doubt on the validity of the judgment of the court below or its "interpretive methodology." In *EMA*, this Court ruled that the plain meaning of the word "standard" in Section 209(a) of the federal Clean Air Act, 42 U.S.C. § 7543(a), compelled preemption of a state law requiring operators of fleets of motor vehicles to purchase a specified percentage of low-emission vehicles. That ruling in no way suggests that the

decision below, on a different statute in which an ambiguous multi-word phrase is at issue, is incorrect, nor does it support the propriety of this Court's review. Indeed, just the opposite is true, for in both *EMA* and the instant case, "the 'presumption against preemption' . . . demonstrably makes no difference to the resolution of the principal question. . . ." 541 U.S. at 256; see pp. 8-9 *supra*. Moreover, the *EMA* Court was presented with a situation in which different circuits had interpreted the applicable statute with different results. 541 U.S. at 251 (citing *Ass'n of Automobile Mfrs. v. Comm'r, Mass. Dep't of Envtl. Prot.*, 208 F.3d 1 (1st Cir. 2000); *American Auto Mfrs. Ass'n v. Cahill*, 152 F.3d 196 (2d Cir. 1998)). Where, as here, no comparable conflict is presented, further review by this Court is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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SUPPLEMENTAL BRIEF

Petitioners Air-Conditioning and Refrigeration Institute *et al.* submit this Supplemental Brief in response to the Brief for the United States as Amicus Curiae. The United States contends, in sum and in substance, that certiorari should not be granted because the Ninth Circuit's result can be defended on grounds not identified by the court below. From the government's perspective, the Ninth Circuit's badly misconceived method of statutory interpretation—to announce an insupportably broad presumption against preemption; to use that presumption repeatedly to interpret the statutory preemption provision in unduly "narrow" fashion; and on that basis to find no preemption—is beside the point. Accordingly, the government makes no attempt to defend the Ninth Circuit's formulation of the presumption against preemption, nor any serious effort to defend that court's statutory analysis of the preemption provision. And, perhaps most strikingly, the government does not argue that this issue is not important. Rather, it simply takes a different view of certain (but not all) aspects of the merits of the case—a dispute that this Court should properly resolve after full briefing on the merits.

I. THIS CASE CLOSELY RESEMBLES *EMA*.

Before addressing the government's interpretation of 42 U.S.C. §§ 6297 and 6316, it is important first to note the critical issue that the government glosses over—the striking similarity between this case and *Engine Manufacturers Association* v. *South Coast Air Quality Management District*, 309 F.3d 550 (9th Cir. 2002), *vacated*, 541 U.S. 246 (2004). The government makes only a passing nod to *EMA*, and simply notes that the two cases involve different statutes. U.S. Br. 14-15. But this observation misses the critical point identified by the dissent below—namely, that the Ninth Circuit's decisions in *EMA* and here are of a piece; on both occasions, that court deployed an exceedingly broad formulation of the presumption against preemption to justify misreading a federal

preemption provision. Pet. 11-14. The government's characterization of the opinion as having "carefully analyzed the relevant [statutory] language," U.S. Br. 15, is wholly belied by the Ninth Circuit's failure to address the plain meaning of the statutory terms, and its dozen assertions that it was construing the preemption provision "narrowly." Pet. 11-12. The decision below is *precisely* like the decision that this Court thoroughly rejected in *EMA*, and this alone merits plenary review.

II. THE GOVERNMENT MISINTERPRETS 42 U.S.C. § 6297.

The bulk of the government's submission is devoted, not to evaluating the importance of the issue presented, nor to the federal interest therein, but to an interpretation of the statutory language that goes far beyond any analysis the Ninth Circuit performed. The government makes no effort to respond to, much less contest, the Petition's showing that the decision below has significant practical repercussions for this federal regulatory regime, for the entities that it regulates, and for federal preemption provisions in general. Pet. 21-25; AAM Br. 15-16. It does not dispute that the California requirement imposes a substantial burden on the regulated industries; that the draconian enforcement mechanism contained in § 1608 effectively ensures that California has won the race to regulate, and so its rule will govern nationwide; and that therefore this issue presents a substantial question of national importance. Pet. 23-24. In short, if the government's interpretation of the statute is mistaken, its argument against certiorari withers away. Indeed, certiorari is warranted if the interpretation of the statute even presents a close question, for that alone demonstrates that the Ninth Circuit's aggressive and mistaken application of a presumption against preemption was decisive in its interpretation of the statute. And, in fact, the government does misinterpret the statute, for the reasons that follow.

1. *Disclosure requirements.* According to the government, CEC's requirement that companies disclose to it the informa-

tion set forth in Cal. Code Regs., tit. 20, § 1606 does not constitute a "disclosure" of information for purposes of 42 U.S.C. § 6297. In interpreting the term "disclosure" in § 6297, however, the government fails even to address its plain meaning. Cf. *United States* v. *Wells*, 519 U.S. 482, 490 (1997) ("We begin with the text."); *United States* v. *Ron Pair Enters., Inc.*, 489 U.S. 235, 241-42 (1989). Of course, in common parlance the word "disclosure" is not limited to "labeling." Pet. 12 (quoting dictionaries); Pet. App. 21a (Noonan, J., dissenting) ("Disclosure to a state agency is as much an opening up to view of the data as a disclosure to consumers would be."). The government instead begins its analysis with § 6297's title, which it admits can only "'aid in resolving an ambiguity,'" U.S. Br. 6, and "cannot control the plain words of the statute," 2A Norman J. Singer, *Sutherland Statutory Construction* § 47:03, at 215 (6th ed. 2000); see *Brotherhood of R.R. Trainmen* v. *Baltimore Ohio R.R.*, 331 U.S. 519, 528 (1947) ("That the [section heading] fails to refer to all the matters which the framers of that section wrote into the text is not an unusual fact.... [H]eadings and titles are not meant to take the place of the detailed provisions of the text.").

It then puts primary weight on the argument that § 6297(a)(1)(B) cross-references § 6294 (which deals with labeling), and that both sections use variants of the term "disclose." From this, it concludes that the term "disclosure" must relate to labeling. U.S. Br. 7. This argument is mistaken. By its terms, § 6297 preempts certain state-mandated disclosures, unless the disclosures are of information set forth in § 6294. See 42 U.S.C. § 6297(a)(1)(B). But this in no way means that only state *labeling* requirements are preempted. On the contrary, the natural reading of this language is that *all* disclosures are preempted, whether the disclosure is effectuated through labeling or otherwise, with the limited exception of certain specified labeling requirements, which are but one subset of disclosures. Reply 8-9. If Congress intended to preempt only labeling requirements, rather than all disclo-

sures, surely it would have said so. Cf. *Bailey* v. *United States*, 516 U.S. 137, 143 (1980) (if Congress meant the term "use" to mean "possess," "it easily could have so provided").

Nor is the government's interpretation supported by the statute's use of the verb "submit" rather than "disclose" in § 6296, which authorizes the Secretary to require "each manufacturer of a covered product to *submit* information or reports." 42 U.S.C. § 6296(d)(1) (emphasis added). The government says the different terminology means that "submit" refers to disclosures to the government, and "disclose" means disclosures to the public. But the difference between these words does not pertain to *who receives the information*. Rather, Congress used the word "submit" in § 6296—and the words "provide" and "supply" in §§ 6296(a), (b)(2), (b)(4) and (d)(1)—because all three connote the power to require both the production of information and the turning over of that information. Using the verb "disclose," however, would have implied that manufacturers must provide only *preexisting* "information or reports." (Indeed, this is why Congress both empowered the Secretary to compel product testing to generate energy use and efficiency information in § 6293, and then separately authorized the Secretary to prescribe how such testing information could be disclosed in § 6294.) The different terminology, therefore, does not support the lower court's (or the government's) interpretation at all.[1]

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[1] Moreover, even if the term "disclosure" refers only to providing information to assist consumers in making purchasing decisions, the preemption provision still applies. The ultimate point of the state requirements at issue in this case is to provide information about energy use and energy efficiency to assist consumers in making purchasing decisions. That of course is the purpose of federal labeling requirements as well. *See* 42 U.S.C. § 6294(a)(2)(A) (labeling rules not required for certain covered products if FTC determines labels are "not likely to assist consumers in making purchasing decisions"); *id.* § 6294(a)(3). Thus, even if the preemption provision bars only those state regulations that mandate disclosures to consumers, there is no reason to limit preemption to point-of-sale disclosures or disclosures effectuated by means of a label. The federal program is carefully crafted to avoid imposing undue burdens and costs on

The government's remaining arguments concerning the disclosure provision are simply irrelevant. That the States have some role in energy conservation is beside the point; nothing in Petitioners' argument would in any way impede the implementation of building codes, U.S. Br. 8-9, for the statute deals expressly with this problem—it exempts from preemption provisions "contained in" building codes, 42 U.S.C. § 6297(f)(3), which this regulation assuredly is not. Next, the government's interpretation of § 6297 is plainly not "long-standing." U.S. Br. 9. This claim is supported by a single FTC remark, made without analysis, that the Commission at the time euphemistically termed "largely moot." 54 Fed. Reg. 28,032, 28,033 (July 5, 1989); U.S. Br. 10 n.4. This stillborn pronouncement merits no deference whatsoever, and certainly has no "power to persuade." *United States* v. *Mead Corp.*, 533 U.S. 218, 228 (2001). Finally, the government is wrong about the history of § 6297. U.S. Br. 10-11. To be sure, in 1975, § 6297(a)(1) preempted disclosures only when there existed a rule under § 6294. But rules can be, and have been, promulgated under § 6294 that relate to issues other than pure product labeling,[2] and in any event the 1987 revision of § 6297 removed this condition, and thereby strongly indicated

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manufacturers, while ensuring that consumers receive energy use and energy efficiency information that is useful to purchasing decisions. *E.g.*, *id.* § 6293(b)(3) (test procedures must be "reasonabl[e]" and "not ... unduly burdensome"). That careful balance is destroyed if States can mandate different and more burdensome requirements as long as they reach consumers by some means other than a point-of-sale label, such as a state website. Indeed, many products are not purchased on showroom floors, but by builders and architects more likely to consult websites.

[2] The most conspicuous example is 16 C.F.R. part 305 itself, which regulates not only product labels, but also printed matter concerning products, *id.* § 305.1(b), and representations (whether "in writing or in broadcast advertising") concerning energy consumption, cost and efficiency, *id.* § 305.1(d). *See also id.* §§ 305.4(b)(5), 305.14 (catalogs); § 305.4(d)(1)-(2) (broadcast advertisements); *cf.* 52 Fed. Reg. 46,888, 46,894-902 (Dec. 10, 1987) (promulgating regulations pursuant to 42 U.S.C. § 6294).

that, whatever the state of affairs in 1975, § 6297 is not now confined to labeling.

2. *Labeling requirements*. The government next argues that, although § 6297(a)(1) preempts "*any* State regulation insofar as such State regulation provides *at any time* for the disclosure of information *with respect to any* measure of energy consumption ... of any covered product" (emphases added), it does not preempt California's §§ 1607(b) and (c), because the California provisions require disclosure of only "routine product information," U.S. Br. 12. According to the government, the phrase "with respect to any measure of energy consumption" covers only information that has an "inherent connection" to energy consumption. *Id.* But the concept of an *inherent*, or *immediate*, connection to energy consumption appears nowhere in the statute itself, and ignores the obviously expansive scope of this provision, with its repeated reference to "any" and its use of the capacious phrase "with respect to." Pet. 17. The California-mandated disclosures are at the heart of a program that regulates energy consumption; that is a more than sufficient basis for concluding that they fall within the scope of a provision expressly designed to preempt state energy-related labeling requirements. Pet. 17-18; Reply 9. Indeed, the government's argument makes no practical sense. There is no reason that Congress would have preempted only labeling requirements as to information with an "inherent connection" to energy consumption, U.S. Br. 12, but permitted all other regulation. The California requirement demonstrably imposes substantial burdens, Pet. 24, which the government does not dispute, and the entire purpose of the preemption provision was to alleviate this type of product regulation by States. H.R. Rep. No. 100-11, at 19, 24, 28 (1987).

3. *Marking requirements for industrial and commercial equipment*. The government concedes that "[t]here is some force to" Petitioners' argument about California's marking requirements for industrial and commercial equipment. U.S.

Br. 13-14. Given that the federal statute requires *no* comparable information, California's marking requirements certainly require a disclosure of information that is "other than information required under" EPCA. Pet. 19-20; Pet. App. 22a (Noonnan, J., dissenting). The regulation is therefore preempted. The government's sole argument is that certiorari is not warranted, on the theory that there is no conflict of authority and no *current* inconsistency between California's regulations and other States'. U.S. Br. 13-14. This observation seriously underestimates the budens manufacturers have already borne under the California program and the significant risk of additional burdens the Ninth Circuit's ruling creates.

There is nothing to stop any of the other eight States within the Ninth Circuit from imposing additional or even inconsistent labeling requirements, forcing manufacturers to retool and reprogram again. Under the Ninth Circuit's reasoning, moreover, States around the nation can adopt such regulations, and manufacturers can avoid these burdens only if they are able to obtain a stay, create a circuit conflict and then obtain review in this Court. The significant costs and potential confusion of such a patchwork system are precisely what Congress sought to avoid when it implemented a "comprehensive *national* energy policy." S. Conf. Rep. No. 94-516, at 116 (1975), *reprinted in* 1975 U.S.C.C.A.N. 1956, 1957. The benefits of further "percolation" of the issues in the lower courts cannot justify such burdens, particularly where the Ninth Circui has simply employed the same flawed preemption analysis that this Court only recently rejected in *EMA*.

III. THE PRESUMPTION AGAINST PREEMPTION LIKEWISE MERITS THIS COURT'S REVIEW.

The government's argument concerning the presumption against preemption is most telling for what it does not say—at no point does it defend the Ninth Circuit's extreme formulation of the rule. Pet. App. 4a-5a & n.1. Rather, it makes the very narrow argument that the holding in the decision below

does not squarely conflict with a "sole[]" holding of this Court or another court of appeals. U.S. Br. 17. Its use of the qualifier "solely" presumably is meant to account for the fact that this Court has indeed "declined to apply a presumption against preemption … on the ground that the relevant sphere of conduct had not traditionally been regulated by the States." U.S. Br. 17; *see* Pet. 14-15 (discussing, among others, *Buckman Co.* v. *Plaintiffs Legal Comm.*, 531 U.S. 341, 347-48 (2001)).

The government further argues that there is no conflict among the circuits. This is not so. At an absolute minimum, the decision of the First Circuit in *UPS, Inc.* v. *Flores-Galarza* conflicts squarely with the decision in this case, as well as decisions of the Fourth and Seventh Circuits stating that the presumption against preemption always applies. Compare 318 F.3d 323, 336 (1st Cir. 2003) (the presumption "*only* arises … if Congress legislates in a field traditionally occupied by the states" (emphasis added)), with *Frank Bros., Inc.* v. *Wisconsin Dep't of Transp.*, 409 F.3d 880, 885 (7th Cir. 2005) ("we presume that, *in all circumstances*, 'Congress does not intend to supplant state law'" (emphasis added)), and *Pinney* v. *Nokia, Inc.*, 402 F.3d 430, 453 (4th Cir.), *cert. denied*, 126 S. Ct. 551, 552 (2005) (Nos. 05-198, 05-207); see Pet. 16-17 (discussing same). The government dismisses the clear statement in *UPS* as "dictum," U.S. Br. 19 n.7, but it is nothing of the sort—this was the First Circuit's clear statement of the governing principle, it was unequivocal, and it remains the law of the First Circuit. 318 F.3d at 336. The government does not even cite, much less address, *Frank Brothers* and *Pinney*.

The remainder of the government's argument depends upon giving the case law an unduly narrow reading. But even parsing the cases as finely as the government does, its argument fails. It seeks to divide the cases into two categories: those holding that the presumption *does* apply when there is a history of *state* regulation, and those holding that it *does not* ap-

ply when there is a history of *federal* regulation. Thus, it suggests, this case falls into an intermediate category—with no history of federal or state regulation—that it says neither the court below nor other courts have addressed. U.S. Br. 18-19 & nn.5-6. This is not so. The all-or-nothing cases cited above, and largely ignored by the government, would apply equally to this supposed intermediate zone. Other cases likewise do not fall into the neat dichotomy the government posits. *E.g.*, *Public Util. Dist. No. 1* v. *Odacorp Inc.*, 379 F.3d 641, 648 n.7 (9th Cir. 2004) ("'We apply a presumption against federal preemption unless the state attempts to regulate an area in which there is a history of significant federal regulation.'").

In any event, the decision below does place this case into one of the two categories the government intuits—it treats this as a case with no history of federal regulation, for it would not have applied the presumption if there were such a history. Pet. App. 4a n.1. The Ninth Circuit would find a history of federal regulation in a New Deal-era statute. *Id.* (citing *Ting* v. *AT&T*, 319 F.3d 1125, 1136 (9th Cir. 2003), which relied upon the Federal Communications Act of 1934)). But the line drawn by this case and *Ting* conflicts directly with cases holding that a shorter history suffices to defeat the presumption, as well as cases that require a longer history of federal regulation. The First Circuit has held that a federal statute more recent than EPCA—the Federal Aviation Administration Authorization Act of 1994—sufficed to demonstrate a history of federal regulation that defeated application of the presumption. *UPS*, 318 F.3d at 336. By contrast, the California Supreme Court has held that even federal regulation since 1935 is not enough; "federal activity" must be "'manifest since the beginning of our Republic.'" *Bronco Wine Co.* v. *Jolly*, 95 P.3d 422, 441 n.42 (Cal. 2004), *cert. denied*, 125 S. Ct. 1646 (2005); see also *Pinney*, 402 F.3d at 454 n.4 ("there is not the same federal presence in the wire-

less telecommunications area as there is in the area of maritime commerce" at issue in *Locke*).

Most importantly, it remains abundantly clear that the Ninth Circuit's formulation of the presumption against preemption, and the repeated "narrow interpretations" that followed from its application of the presumption, drove the result in this case. The government offers only the most timid suggestion to the contrary, U.S. Br. 15, and instead relies upon its own statutory analysis. That analysis is wrong, for all of the reasons set forth above, and so what remains is the badly distorted statutory analysis set forth by the Ninth Circuit. Given the importance of this issue, both to the national regulatory scheme that Congress enacted and to the regulated industries governed by that scheme, it plainly merits this Court's review.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

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IN THE

Supreme Court of the United States

AIR CONDITIONING & REFRIGERATION INSTITUTE *et al.*,
Petitioners,

v.

ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF

In the decision below, the Ninth Circuit distorted a federal statutory scheme because it found the State's regulatory approach to be "laudable," a proposition unsupported by any record evidence. This method of statutory interpretation, objectionable in and of itself, flies in the face of this Court's decision just two Terms ago to vacate a similar Ninth Circuit decision, which likewise interpreted a federal preemption provision in a limited, atextual fashion to uphold a state statute that the Ninth Circuit deemed praiseworthy. See *Engine Mfrs. Ass'n* v. *South Coast Air Quality Mgmt. Dist.*, 541 U.S. 246 (2004) ("*EMA*"). This alone merits certiorari. See Sup. Ct. R. 10(c) (review is warranted when a lower court "decided an important federal question in a way that conflicts with relevant decisions of this Court").

Moreover, in the course of ignoring this Court's recent precedent, the decision below exacerbated a circuit split over the proper application of the "presumption against preemption." Respondent CEC all but concedes the existence of this conflict, answering only that the conflict is not acknowledged, and that it can be written off as merely loose language employed by some courts of appeals. The former contention is quite beside the point, and the latter simply is not true. The lower courts are in disarray over the proper application of the presumption against preemption, and the conflict on this issue is beyond question. This Court's review is necessary to bring clarity to this recurring issue that arises in a badly confused area of law under the Supremacy Clause.

I. THE DECISION BELOW CONFLICTS WITH BINDING PRECEDENT OF THIS COURT ON AN IMPORTANT QUESTION OF FEDERAL LAW.

The Petition demonstrates that the decision below stands squarely in conflict with *EMA*. Pet. 11-14. In *EMA*, this Court analyzed an express preemption provision of the Clean Air Act "which prohibits the adoption or attempted enforce-

ment of any state or local 'standard relating to the control of emissions from new motor vehicles or new motor vehicle engines.'" 541 U.S. at 251. At the center of this Court's decision was its interpretation of the statutory term "standard." Adopting an approach designed to preserve state law at all costs, the Ninth Circuit held that the generic term "standard" did not include "standards imposed through purchase restrictions." *Id.* at 256. This Court rejected that limiting interpretation because the language of the statute "is categorical." *Id.*

Here, too, the Ninth Circuit sought to circumvent the "categorical" language of the statute. In sweeping language, the Energy Policy and Conservation Act preempts "*any* State regulation [that] provides *at any time* for the disclosure of information with respect to *any* measure of energy consumption." 42 U.S.C. § 6297(a) (emphases added). Rather than interpret the term "disclosure" by its terms, however, the Ninth Circuit applied a "narrow interpretation," see Pet. App. 7a, to conclude that the term means "labeling directed to consumers at point of sale or use," *id.* at 8a. In both this case and in *EMA*, the Ninth Circuit imposed an atextual limitation on statutory text. Certiorari is warranted, just as in *EMA*, to reverse the Ninth Circuit's erroneous interpretation of an important federal statute. Indeed, review is more important here than it was in *EMA*, so that this Court can reaffirm the validity of its own recent precedent that the Ninth Circuit casually cast aside. See *id.* at 22a (Noonan, J., dissenting).

It is telling that the CEC has almost nothing to say about *EMA*, other than to argue that this case involves "a different statute." Opp. 11. It should hardly require explanation that, although the two cases interpret different statutes, they concern the same *legal rule*—namely, that lower courts should not distort the text of federal statutes in an effort to preserve from preemption state statutes that they find "laudable." The Ninth Circuit took that approach in *EMA*, and this Court re-

versed. The Ninth Circuit followed precisely that course again here, and this Court again should reverse.[1]

For the same reason, the CEC is mistaken to argue that there is no important issue of federal law at stake. Opp. 4. It is of course true, as CEC argues, that at its narrowest this case involves the interpretation of a preemption provision in one federal statute. *Id.* But this is true of every case involving express preemption under the Supremacy Clause, and it has been no barrier to this Court's granting review to interpret numerous statutory preemption clauses—including four in the last two Terms alone.[2]

This is for good reason. Whether a court may impose a crabbed, atextual interpretation on a statutory preemption provision is a question of surpassing national importance and federal concern. It has substantial implications for the legislative process. If courts may do what the Ninth Circuit did here, then the legislative bargains that lie at the heart of complex regulatory statutes will be undercut, leading to uncertainty in the legislative process, and placing entities regulated at the federal level unsure as to what rules to follow. Preemption provisions are often enacted to ensure that, when an industry is subjected to additional regulatory burdens at the federal law, it can count on uniform regulation. But if the guarantee of uniformity is meaningless—as it is following decisions like the Ninth Circuit's in *EMA* and this case—then the

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[1] The CEC also argues that *EMA* presented a better case for review because it involved a circuit split over the interpretation of a particular statute. Opp. 11. To the contrary, *this* is the more compelling case for certiorari. In addition to its conflict with *EMA*, the decision below involves a well-established conflict over a fundamental legal principle—the proper application of the presumption against preemption—that affects not just a single statute, but potentially governs the preemptive effect of every federal statute. *See* Pet. 14-21; *infra* Section II.

[2] *See Mid-Con Freight Sys., Inc.* v. *Michigan Pub. Serv. Comm'n*, 125 S. Ct. 2427 (2005); *Bates* v. *Dow Agrosciences LLC*, 125 S. Ct. 1788 (2005); *Aetna Health Inc.* v. *Davila*, 542 U.S. 200 (2004); *EMA*, 541 U.S. 246 (2004); *Nixon* v. *Missouri Mun. League*, 541 U.S. 125 (2004).

legislative deal is undone, thereby creating great uncertainty and imposing tremendous costs on interstate businesses. See Pet. 23-24 & nn.14-17; Br. for Alliance of Automobile Mfrs. *et al.* as *Amici Curiae* ("AAM Br."), at 12-16. These are indeed important questions of federal law, and they merit this Court's review.

II. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS REGARDING THE "PRESUMPTION AGAINST PREEMPTION."

The Petition further demonstrates that there is a well-developed conflict among the courts of appeals concerning the proper formulation of the "presumption against preemption." Pet. 16-17. At least eight circuits have weighed in, and they are badly divided. The First, Second, Eighth, Eleventh and D.C. Circuits hold that the presumption only applies when the federal preemption provision concerns a field of significant or "traditional" state regulation. *Id.* at 16 (citing cases). This formulation is consistent with this Court's prior decisions. *Id.* at 14-15. In direct conflict, the Fourth, Seventh and Ninth Circuits *always* apply the presumption. *Id.* at 16-17. Given the breadth and maturity of this conflict—and particularly in light of the innumerable federal preemption provisions that are necessarily affected by the presumption—this important issue of federal law warrants review.

The CEC's inability to muster a substantive argument why this conflict is unworthy of certiorari only confirms that certiorari is appropriate. The CEC seeks to cast aside the circuit split, chalking it up to "incidental differences in wording" among the circuits. Opp. at 6. But it offers no analysis to substantiate this assertion—no showing that the conflict is illusory, or that the cases actually employ the same legal rule. That is no mere oversight: Even the most cursory review reveals that the lower courts have announced flatly inconsistent rules. The First Circuit, for instance, in *UPS, Inc.* v. *Flores-Galarza*, declined to apply the presumption because it "*only*

arises ... if Congress legislates in a field traditionally occupied by the states." 318 F.3d 323, 336 (1st Cir. 2003) (emphasis added). The Seventh Circuit, by contrast, has reasoned that the presumption applies "in *all* circumstances." *Frank Bros., Inc.* v. *Wisconsin Dep't of Transp.*, 409 F.3d 880, 885 (7th Cir. 2005) (emphasis added). The problem is not that the courts of appeals are failing to use "the exact same words," Opp. 6; it is that they are not using the same *principle*.

The conflict over this principle, moreover, is an extremely important one. Prominent commentators repeatedly have criticized the lack of clarity surrounding the presumption against preemption. See, *e.g.*, Viet D. Dinh, *Reassessing the Law of Preemption*, 88 Geo. L.J. 2085, 2086 (2000); Caleb Nelson, *Preemption*, 86 Va. L. Rev. 225, 298-303 (2000). And, others have indeed "supposed," cf. Opp. 7, that this case merits this Court's review—in fact, this petition is not even the only one currently pending before the Court that presents this precise issue. See Petition for Writ of Certiorari at 25-26 & n.6, *Nokia, Inc.* v. *Naquin*, No. 05-198 (filed Aug. 10, 2005). The briefs filed in that case further demonstrate the intractable confusion surrounding the application of the presumption. There are conflicts over numerous aspects of when the presumption arises and how it should be applied. For instance, there is genuine disarray as to what federal presence in a field is sufficient to overcome the presumption when it otherwise would apply, and disagreement about how to define the relevant domains of state and federal regulation in deciding whether either has significantly, traditionally or historically regulated a field. See Br. of Product Liability Advisory Council, Inc. as *Amicus Curiae* at 6-13, *Nokia, Inc.* v. *Naquin*, No. 05-198 (filed Sept. 30, 2005).[3]

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[3] Because *Nokia* relates to conflict preemption (rather than express preemption) and has an overlay of regulatory preemption, it would be appropriate to grant certiorari in both *Nokia* and this case. At a minimum, however, if certiorari is granted in *Nokia*, this petition should be held pending resolution of that case.

III. THE DECISION BELOW WAS MISTAKEN, AND THREATENS SERIOUS CONSEQUENCES TO IMPORTANT FEDERAL INTERESTS.

Finally, the Petition demonstrates that the decision below was wrong, and that the Ninth Circuit's error threatens severe consequences for the companies regulated by the California regime, and for national industries that depend on consistent enforcement of federal preemption provisions. Pet. 17-25; see also AAM Br. at 12-16. In response, the CEC argues that the Ninth Circuit correctly articulated the presumption against preemption, and correctly applied it to the California statute. The former contention is mistaken; the latter is largely beside the point at this stage, but in any event is also incorrect.

1. The CEC intimates that the Ninth Circuit was correct that the presumption against preemption always applies. It argues that the decision below "did no more than apply this Court's admonition that '[c]onsideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law.'" Opp. 7 (alteration in original; emphasis omitted) (quoting *Maryland* v. *Louisiana*, 451 U.S. 725, 746 (1981)). The Ninth Circuit, however, did not even cite *Maryland* v. *Louisiana*, and the CEC misinterprets that case in any event. The CEC relies on a portion of *Maryland* in which the Court interpreted *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218 (1947), and this Court already has explained that *Rice* "does not support the scope given to it" by the CEC, and that the presumption applies only when Congress legislates "'in a field which the States have traditionally occupied.'" *United States* v. *Locke*, 529 U.S. 89, 107-08 (2000) (quoting *Rice*, 331 U.S. at 230). *Locke* interprets in similar fashion *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470 (1996) (which the decision below did actually cite, Pet. App. 4a). See *Locke*, 529 U.S. at 108. In short, the Ninth Circuit indeed got it wrong, and the CEC now does the same.

Nor is the decision below correct because the California regulations fall within the State's police powers. Opp. 7. The

implication—although the CEC fails to explain it—is that the presumption applies whenever a State acts pursuant to its police powers. That is not the law. The presumption applies when there is a "significant" history of state regulation, or the dispute arises in "'a field which the States have traditionally occupied.'" *Buckman* v. *Plaintiffs' Legal Comm.*, 531 U.S. 341, 347 (2001); see *Bates* v. *Dow Agrosciences LLC*, 125 S. Ct. 1788, 1801 (2005) ("In areas of traditional state regulation, we assume that a federal statute has not supplanted state law ...."). It applies to areas in which the States *actually* have traditionally regulated, and the disclosure of energy appliance information is not such an area.

Contrary to the rule the CEC advances, this Court has rejected application of the presumption when a State plainly was acting pursuant to its police powers. In *Buckman*, for instance, the Court held that a claim of fraud—which unquestionably involves a State's general police powers—was not protected by the presumption against preemption because the variety of fraud alleged (fraud on a federal government agency) was not "'a field which the States have traditionally occupied.'" 531 U.S. at 347. The rule that the CEC proposes would prove far too much—nearly all state regulation is pursuant to the States' police powers, see *Barbier* v. *Connolly*, 113 U.S. 27, 31 (1884), and all state regulation can be characterized as such. The CEC's proposed rule is limitless.

Even were the CEC correct that some of this Court's precedents stand for the view that the presumption against preemption always applies, then that simply would mean that this Court's own decisions concerning the presumption are inconsistent. Some (like *Locke*, and the cases cited in the Petition at 14-15) stand for the proposition that the presumption applies only "'in a field which the States have traditionally occupied,'" *Locke*, 529 U.S. at 108, and others (like *Maryland* and *Medtronic*, if the CEC is correct) would mean that the presumption always applies. If the CEC is correct that a con-

flict exists among this Court's own precedents, then that is more reason, not less, to grant the petition.

2. The CEC further argues that the Ninth Circuit's interpretation of the federal preemption provision was correct in any event. Opp. 8-10. This is not the place to debate fully the merits of the underlying substantive issues, nor is there space to do so, but several points in this regard cannot go unanswered. *First*, it defies credulity to argue that "the court of appeals did not rest its ruling on the 'presumption against preemption.'" *Id.* at 8. The presumption was outcome determinative in the decision below. At every turn—twelve times in all—the Ninth Circuit justified its interpretation by invoking the "narrow interpretation" that the presumption against preemption supposedly authorizes. The court employed a "narrow interpretation" to justify its interpretation of each of the key statutory terms. Pet. App. 7a, 14a. The court did not "independently appl[y] traditional 'rules of statutory construction,'" Opp. 8; its analysis was affected and infected throughout by its improper application of the presumption against preemption.

Second, the Ninth Circuit's interpretation of the term "disclosure of information" is untenable. Pet. 12; Pet. App. 21a-22a (Noonan, J., dissenting). The federal statute preempts "any State regulation [that] provides at any time for the disclosure of information," 42 U.S.C. § 6297(a)(1), and the California regulations require manufacturers to disclose copious information to the CEC. Nothing in the meaning of the term "disclosure" limits its application to "labeling directed to consumers at point of sale or use." Pet. App. 8a. It is logically erroneous to assert, as the Ninth Circuit and the CEC have done, that because disclosures to consumers at the point of sale or use are one type of "disclosure of information," *e.g.*, 42 U.S.C. § 6294, then the term "disclosure of information" comprises *only* disclosures to consumers at the point of sale or use. Opp. 8; Pet. App. 7a-8a. This is the logical equivalent of saying that because dogs are one type of animal, all ani-

mals are dogs. This argument is logically incoherent, in statutory interpretation as in life.[4]

Third, the Ninth Circuit's interpretations of the statutory terms "with respect to" and "other than" are similarly atextual. Pet. 17-20. The federal statute preempts disclosures of information that are "with respect to any measure of energy consumption." 42 U.S.C. § 6297(a)(1), 6297(a)(1)(B). The information that the California regulations require manufacturers to disclose is for the express purpose of regulating energy consumption, as the CEC itself has conceded. Pet. 17-18. Under any meaningful interpretation of the expansive statutory phrase, such disclosures are "with respect to" energy consumption. The CEC makes no substantive argument to the contrary; it simply parrots the Ninth Circuit's holding and asserts that it was "correct[]." Opp. 10.

The Ninth Circuit's interpretation of the phrase "other than" is equally flawed. The federal statute preempts disclosures of information "other than" information required by federal law. 42 U.S.C. § 6297(a)(1)(B). The Ninth Circuit, however, held that the California information-disclosure requirements are not "other than" the federal requirements because there are no federal requirements in place. Pet. App. 17a-19a. The fallacy

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[4] With regard to California's information-disclosure requirements, the CEC's blithe assertion that "appliance manufacturers have complied without apparent difficulty" since 1977, Opp. 2, is badly misleading. The very point of this lawsuit, as the CEC well knows, is that the CEC amended its regulations in 2002 to require additional and more comprehensive information disclosure, and to impose for the first time a pre-market approval requirement that would close the California market to noncompliant manufacturers. Moreover, the CEC's argument is somewhat galling. In an effort to act through conciliation rather than litigation, some manufacturers (but not all) disclosed information to CEC over the years, all the while asserting and preserving the argument that the regulations are preempted by federal law. The suggestion that partial compliance—under protest—with a less burdensome set of regulations somehow affects the merits of this case is absurd, and would create perverse incentives to race to the courthouse rather than negotiate with state regulators.

of this argument is plain. See Pet. 19-21. As Judge Noonan explained in dissent, "Where there are no federal regulations on the subject because the DOE has not promulgated any regulations, then any state regulations are 'other than' those federally required." Pet. App. 22a. Notably, the Ninth Circuit's sole support, *Puerto Rico Department of Consumer Affairs* v. *Isla Petroleum Corp.*, 485 U.S. 495 (1988), is wholly irrelevant. Pet. App. 18a. That case addressed the circumstances under which federal inaction alone could preempt state regulation. 485 U.S. at 503. It said nothing whatsoever about express preemption clauses, much less the proper interpretation of the "other than" clause at issue here.

* * *

The decision below has a decidedly Orwellian quality about it. According to the Ninth Circuit, to disclose information to the government is not a "disclosure of information." Mandatory disclosures that are intended to permit the CEC to monitor energy consumption are not "with respect to" energy consumption. And, disclosures that are different from federal requirements are not "other than" those federal requirements. Compounding this dizzying uncertainty is a lingering sense of déjà vu. It is almost exactly 18 months since this Court in *EMA* forcefully reversed another Ninth Circuit decision that "indulge[d] idiosyncratic imagination," Pet. App. 22a (Noonan, J., dissenting), in its interpretation of a federal preemption provision. The Court should do the same here.

CONCLUSION

For the foregoing reasons, and those set forth in the Petition, the Petition for a Writ of Certiorari should be granted.

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No. 05-331

In the Supreme Court of the United States

AIR CONDITIONING AND REFRIGERATION INSTITUTE, ET AL., PETITIONERS

v.

ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether certain labeling, product-marking, and data-submission requirements imposed upon appliance manufacturers by the State of California are preempted by Section 327(a)(1) of the Energy Policy and Conservation Act, Pub. L. No. 94-163, 89 Stat. 926 (42 U.S.C. 6297(a)(1)).

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINIONS BELOW

This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. The Energy Policy and Conservation Act (EPCA or Act), Pub. L. No. 94-163, 89 Stat. 871, was enacted in 1975 and has been amended by, inter alia, the National Appliance Energy Conservation Act of 1987 (NAECA), Pub. L. No. 100-12, 101 Stat. 103. See Pet. App. 9a-12a (summarizing development of statutory scheme). The Act is jointly administered by the Federal Trade Commission (FTC or Commission) and the Secretary of Energy (Secretary).

The appliances covered by the Act include 18 specified consumer products (*e.g.*, refrigerators, air conditioners, water heaters, and clothes washers), as well as any other consumer

products that are classified as "covered product[s]" by the Secretary. See 42 U.S.C. 6292(a). The EPCA authorizes the Secretary to prescribe "[t]est procedures" (42 U.S.C. 6293), which "shall be reasonably designed to produce test results which measure energy efficiency, energy use, water use * * *, or estimated annual operating cost of a covered product during a representative average use cycle or period of use." 42 U.S.C. 6293(b)(3). The Act directs the FTC to promulgate labeling rules for covered products. See 42 U.S.C. 6294. The label for a covered product must "disclose[]" the appliance's estimated annual operating cost (as determined under the Secretary's testing procedures) and the range of estimated annual operating costs for comparable products. 42 U.S.C. 6294(c)(1)(A) and (B). A labeling rule may also "require disclosure" of the same information on "printed matter displayed or distributed at the point of sale of such product." 42 U.S.C. 6294(c)(4). Similar testing and labeling provisions apply to certain commercial and industrial appliances. See 42 U.S.C. 6314-6315.

Other EPCA provisions require manufacturers of covered products to furnish information to the Secretary or the FTC. Manufacturers must "submit information or reports to the Secretary with respect to energy efficiency, energy use, or, * * * water use of such covered product," 42 U.S.C. 6296(d)(1); "supply to the Commission relevant data respecting energy consumption or water use" annually, 42 U.S.C. 6296(b)(4); and "provide" to the Secretary or Commission, upon request, "the data from which the information included on the label and required by the [labeling] rule was derived," 42 U.S.C. 6296(b)(2).

The EPCA also provides for "[p]reemption of testing and labeling requirements." 42 U.S.C. 6297(a) (title).[1] Section 6297(a)(1) states that the Act

> supersedes any State regulation insofar as such State regulation provides at any time for the disclosure of information with respect to any measure of energy consumption or water use of any covered product if—
>
> > (A) such State regulation requires testing or the use of any measure of energy consumption, water use, or energy descriptor in any manner other than that provided under section 6293 of this title; or
> >
> > (B) such State regulation requires disclosure of information with respect to the energy use, energy efficiency, or water use of any covered product other than information required under section 6294 of this title.

42 U.S.C. 6297(a)(1).

2. Petitioners are "four major trade organizations representing appliance manufacturers nationwide." Pet. App. 2a. They filed suit in federal district court, alleging that certain regulations of respondent California Energy Resources Conservation and Development Commission (CERCDC), California's energy planning and policy agency, are preempted by 42 U.S.C. 6297(a)(1). As the case comes to this Court, three aspects of the state regulatory scheme remain at issue.

First, Cal. Code Regs. tit. 20, § 1606(a) (Pet. App. 50a-57a) requires manufacturers to file with the CERDC a significant range of information for certain appliances, including data concerning the appliances' consumption of energy. Second, Cal. Code Regs. tit. 20, § 1607(b) and (c) (Pet. App. 69a-70a)

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[1] Pursuant to 42 U.S.C. 6316, the provisions of Section 6297 govern the preemption analysis in cases involving state testing and labeling requirements for commercial and industrial appliances.

"require appliances to be labeled with the manufacturer's name, brand name, or trademark; the appliance's model number; and the date of manufacture." *Id.* at 13a. Third, for certain commercial and industrial appliances as to which no federal labeling regulations have been issued, Cal. Code Regs. tit. 20, § 1607(d)(2) (Pet. App. 70a) requires that specified energy-performance information be marked on each unit and "included on all printed material that is displayed or distributed at the point of sale." See *id.* at 17a n.11.[2] The district court held that the challenged state-law provisions are preempted by the EPCA and enjoined enforcement of those provisions against petitioners. See *id.* at 23a-44a.

3. The court of appeals reversed. Pet. App. 1a-22a.

a. The court of appeals held that the data-submission requirements of Cal. Code Regs. tit. 20, § 1606(a) are not preempted because those provisions do not mandate the "disclosure" of information within the meaning of 42 U.S.C. 6297(a). Pet. App. 6a-12a. In light of "the presumption that Congress did not intend to supplant state law," the court stated that it would "narrowly interpret § 6297(a) in general, and the phrase 'disclosure of information' in particular." *Id.* at 7a. The court explained that the phrase "disclosure of information" is used in other EPCA provisions to refer to labeling requirements, *ibid.*, and that "Congress did not use the phrase 'disclosure of information' in EPCA when it referenced manufacturers providing data to the [DOE]; instead, Congress used the phrase 'submit information or reports,'" *id.* at 7a-8a. The court also noted that its construction of the phrase

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[2] In the courts below, petitioners also asserted a preemption challenge to Cal. Code Regs. tit. 20, § 1607(d)(1) (Pet. App. 70a), which applies to specified appliances and states that the marking required by an FTC regulation, 16 C.F.R. Pt. 305, must be displayed on all units. The court of appeals held that Section 1607(d)(1) is not preempted, see Pet. App. 16a-17a, and petitioners do not appear to contest that holding.

"disclosure of information" is supported by the FTC's regulations implementing the EPCA, which use the word "disclosure" to refer to consumer-directed labeling and the phrase "[s]ubmission of data" to refer to the provision of information to regulators. *Id.* at 8a n.5 (citing 16 C.F.R. Pt. 305).

b. The court of appeals held that the marking requirements of Cal. Code Regs. tit. 20, § 1607(b) and (c) are not preempted because, under an appropriately narrow construction of 42 U.S.C. 6297(a)(1), "[t]he information required to be placed on appliances under section 1607(b) and (c) is not 'information with respect to any measure of energy consumption or water use.'" Pet. App. 14a; see *id.* at 13a-16a. The court explained that "[t]he relation between placing a manufacturer's name, the model name, and the date of manufacture on an appliance and measures of energy consumption, as defined in EPCA, is indirect, remote, and tenuous." *Id.* at 15a-16a.

c. The court of appeals held that Cal. Code Regs. tit. 20, § 1607(d)(2) is not preempted because it applies only to certain industrial and commercial appliances for which no federal labeling requirements have been promulgated. Pet. App. 17a-19a. The court concluded that, because the Department of Energy (DOE) has not yet made an affirmative decision as to the labels that should be placed on those appliances, the challenged state rules could not properly be said to mandate disclosures "other than" what federal law requires. *Id.* at 18a-19a.

d. Judge Noonan dissented. Pet. App. 21a-22a.

ARGUMENT

Petitioners do not contend that any circuit conflict exists regarding the proper interpretation of 42 U.S.C. 6297(a)(1); indeed, they identify no other case in which any court has interpreted that provision. Neither the court of appeals' articulation of the general principles that govern the construc-

tion of express preemption provisions of federal laws, nor the court's application of those principles to the circumstances of this case, presents any issue warranting this Court's review. The petition for a writ of certiorari should be denied.

A. The Court Of Appeals' Analysis Of The California Regulations At Issue Here Does Not Warrant Further Review

1. Petitioners contend (Pet. 17-18) that Cal. Code Regs. tit. 20, § 1606, which requires appliance manufacturers to provide the CERDC with data concerning their products' energy consumption, is preempted by 42 U.S.C. 6297(a)(1). Under Section 6297(a)(1), a state regulation is preempted "insofar as such State regulation provides at any time for the disclosure of information with respect to any measure of energy consumption or water use of any covered product if," *inter alia*, "such State regulation requires disclosure of information with respect to the energy use, energy efficiency, or water use of any covered product other than information required under section 6294 of this title." 42 U.S.C. 6297(a)(1), 6297(a)(1)(B). The court of appeals correctly rejected petitioners' preemption challenge to Cal. Code Regs. tit. 20, § 1606, holding that the relevant state requirements do not mandate the "disclosure of information" within the meaning of Section 6297(a)(1). Pet. App. 12a. Although the phrase "disclosure of information" might in *some* contexts encompass the submission of data to a state regulatory agency, abundant evidence in the text, structure, and history of the specific federal enactments at issue here indicates that the phrase has a more limited meaning in Section 6297(a)(1).

a. Section 6297(a) itself is entitled "Preemption of testing and labeling requirements." 42 U.S.C. 6297(a). "[T]he title of a statute or section can aid in resolving an ambiguity in the legislation's text," *INS* v. *National Ctr. for Immigrants' Rights, Inc.*, 502 U.S. 183, 189 (1991), and the reference to

"labeling requirements" in Section 6297(a)'s title suggests that the term "disclosure" in the same Section is limited to the provision of information to potential purchasers at the point of sale. That inference is reinforced by the fact that the statute preempts state requirements for the "disclosure" of information "other than information required under section 6294." 42 U.S.C. 6297(a)(1)(B). Section 6294 of Title 42 is entitled "Labeling" and directs the FTC to promulgate rules governing the information that must be placed on appliance labels. Section 6294, moreover, uses the words "discloses" and "disclosure" in describing the required contents of product labels under the FTC's rules. See 42 U.S.C. 6294(c)(1) and (4).

By contrast, the EPCA provisions that mandate the submission of information to the FTC or DOE do not use the word "disclosure" or any variant thereof. See Pet. App. 7a-8a. Rather, those provisions direct manufacturers under specified circumstances to "notify the Secretary or the Commission" of models in production to which the agencies' rules apply, 42 U.S.C. 6296(b)(1); to "provide" certain data upon request, 42 U.S.C. 6296(b)(2); and to "submit information or reports to the Secretary," 42 U.S.C. 6296(d). Because Section 6297(a)(1)(B) cross-references Section 6294, and because the terms "disclose" and "disclosure" are used in Section 6294 but not in Section 6296, Section 6297(a)(1)'s reference to state regulations governing "disclosure of information" is most naturally read as limited to state laws that are of the same character as Section 6294—*i.e.*, state labeling directives. See Pet. App. 7a; compare *Commissioner* v. *Lundy*, 516 U.S. 235, 250 (1996) ("The interrelationship and close proximity of these provisions of the statute presents a classic case for application of the normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning.") (citations and internal quotation marks omitted).

b. Although the EPCA reflects Congress's determination that energy conservation is a matter of national concern, the statute also contemplates that States will play an important role in this area. See 42 U.S.C. 6321(a)(1) and (2) (congressional findings). In particular, States are encouraged to develop energy-conservation plans, see 42 U.S.C. 6322, which may include "programs to promote energy efficiency in residential housing" through such measures as "the adoption of incentives for builders, utilities, and mortgage lenders to build, service, or finance energy efficient housing," 42 U.S.C. 6322(d)(8), 6322(d)(8)(B). States and localities are specifically authorized to adopt building codes that "permit[] a builder to meet an energy consumption or conservation objective for a building by selecting items whose combined energy efficiencies meet the objective." 42 U.S.C. 6297(f)(3)(A); see H.R. Rep. No. 11, 100th Cong., 1st Sess. 39 (1987) (explaining that Section 6297(f) "allows States flexibility to implement performance-based building code approaches" that "authorize builders to adjust or trade off the efficiencies of the various building components so long as an energy goal is met"). As a practical matter, effective implementation of such building-code provisions would be substantially impeded if States could not direct appliance manufacturers to submit energy-efficiency data beyond the information required by Section 6294 and the FTC's rules to be included on a product's label.[3] Sec-

[3] Respondents' brief in the court of appeals explained that, under California's building code,

> builders can get "extra credit" for installing equipment of more-than-minimum specifications (e.g., a highly efficient air conditioner), and then "trade off" the extra credit by using more energy in another part of the building (e.g., reducing the amount of insulation in the ceiling or increasing the number or size of windows) in a way that reduces costs or makes the building more attractive to buyers. If states were unable to require manufacturers to submit relevant data,

tion 6297(a)(1) should not be construed in such a manner that it hinders state efforts to implement energy-conservation programs that are affirmatively encouraged by other provisions of the EPCA.

c. The court of appeals' construction of the EPCA term "disclosure" is also consistent with the longstanding position of the FTC. In comments submitted during an FTC rulemaking conducted in 1989, the State of New York urged the FTC to require manufacturers of covered lamp-ballast products to submit energy usage data to the Commission. 54 Fed. Reg. 28,032. As one reason for that request, the State expressed concern that the FTC's failure to require submission of those data could preclude the State from mandating comparable submissions. The State explained that 42 U.S.C. 6297(a)(1)(B) might be construed to "preempt state regulations that require the reporting of information concerning the energy use or efficiency of covered products other than information required to be reported pursuant to § 305.8 of the Commission's Appliance Labeling Rule [16 C.F.R. 305.8]." 54 Fed. Reg. at 28,032.

In response, the FTC expressed the view that

> the most logical and reasonable reading of [42 U.S.C. 6297(a)(1)(B)] is that it does not preempt the states from requiring ballast manufacturers to report energy usage and efficiency information. This section of EPCA applies to the preemption of state testing and labeling requirements. Consequently, when this section states that it preempts state disclosure regulations that differ from the Rule's disclosure requirements, it is referring to testing

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> it would be very difficult to make the calculations necessary to implement the trade-offs.

Resp. C.A. Br. 30-31 (citations omitted).

> and disclosures on a covered product label, not to information-reporting requirements.

Id. at 28,033. As the court of appeals explained, the reading of 42 U.S.C. 6297(a)(1)(B) espoused in the 1989 preamble is also consistent with the text of the FTC's current EPCA regulations, which "use 'disclosure' to refer to consumer-directed labeling and 'submission' to refer to data-submittal to a government entity." Pet. App. 8a n.5.[4]

d. The history of 42 U.S.C. 6297(a)(1) confirms that the provision in its current form does not restrict the States' authority to require manufacturers of covered appliances to submit energy-related data to state regulatory bodies. As originaliy enacted in 1975, Section 6297(a)(1) provided that any state regulation requiring "the disclosure of information with respect to any measure of energy consumption of any covered product" was preempted "*if there is a rule under section 6294 of this title* [*i.e.*, an FTC labeling rule] applicable to such covered product and such State regulation requires disclosure of information other than information disclosed in

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[4] The preemption theory hypothesized by the State of New York in its comments during the 1989 FTC rulemaking was significantly narrower than petitioners' own theory. New York expressed concern that States might be preempted from requiring lamp-ballast manufacturers to report energy-efficiency data beyond the information that manufacturers were required to submit to the FTC pursuant to 42 U.S.C. 6296 and 16 C.F.R. 305.8. See 54 Fed. Reg. at 28,032. Under petitioners' reading of the statute, by contrast, States could not require the submission of energy-efficiency information beyond what is required to be included on the product *label* under 42 U.S.C. 6294 and 16 C.F.R. 305.11. During the 1989 rulemaking, the FTC stated that, because the Commission was amending 16 C.F.R. 305.8 to require ballast manufacturers to submit data to the FTC, the preemption issue raised by New York was "largely moot." 54 Fed. Reg. at 28,033. If petitioners' preemption theory were correct, however, the requirement that such data be provided to the FTC would not eliminate the barrier to a comparable state data-submission requirement.

accordance with such rule under section 6294 of this title." 42 U.S.C. 6297(a)(1), 6297(a)(1)(B) (1976) (emphasis added). The italicized language strongly indicates that the preemptive effect of Section 6297(a)(1) in its original form was limited to state labeling requirements, since there would have been no apparent reason for Congress to make the preemption of state *data-submission* laws contingent on the FTC's promulgation of a *labeling* rule for a particular covered product.

In 1987, the NAECA amended 42 U.S.C. 6297(a)(1) in a manner that raises the question, discussed at pp. 12-14, *infra*, whether that provision in its current form makes the preemption of state law requiring "disclosure" of specified information contingent on the existence of a federal labeling requirement. See 42 U.S.C. 6297(a)(1) (1988). That amendment may affect the preemption analysis when a State seeks to establish *labeling* requirements for a covered product as to which there is no federal regulation imposing labeling requirements. See pp. 12-14, *infra*. But whatever the correct answer to *that* question, neither the text nor the history of the NAECA suggests that Congress intended to alter the meaning of the preexisting statutory term "disclosure," or to expand the preemptive scope of Section 6297(a)(1) to encompass state data-submission as well as labeling requirements. To the contrary, the Senate Report accompanying the NAECA stated that the amended version of Section 6297(a)(1) "essentially restates existing law, and provides that the Act supersedes State and local regulations regarding testing and *labeling* in certain cases." S. Rep. No. 6, 100th Cong., 1st Sess. 9 (1987) (emphasis added).

2. Petitioners contend (Pet. 17-19) that 42 U.S.C. 6297(a)(1) preempts Cal. Code Regs. tit. 20, § 1607(b) and (c), "which require appliances to be labeled with the manufacturer's name, brand name, or trademark; the appliance's model number; and [the appliance's] date of manufacture."

Pet. App. 13a; see *id.* at 13a nn. 7 & 8. That argument lacks merit. The preemptive scope of Section 6297(a)(1) is limited to state regulations that "provide[] * * * for the disclosure of *information with respect to any measure of energy consumption or water use of any covered product.*" 42 U.S.C. 6297(a)(1) (emphasis added). The italicized language does not encompass the routine product information required by Cal. Code Regs. tit. 20, § 1607(b) and (c), which has no inherent connection to a measure of "energy consumption" or "water use"—terms that are themselves defined by the EPCA, as the court of appeals explained. See Pet. App. 14a-15a & n.9.

Petitioners' preemption argument is based on the fact that the markings required by Cal. Code Regs. tit. 20, § 1607(b) and (c) are used in part to facilitate the implementation of energy-conservation programs adopted by the State of California. See Pet. 18. The language of 42 U.S.C. 6297(a)(1), however, does not support petitioners' view that the preemption analysis turns on the nature or purposes of the underlying state regulatory scheme. In Section 6297(a)(1), the phrase "with respect to any measure of energy consumption or water use of any covered product" does not modify "State regulation." Rather, the phrase modifies "information." The wording of Section 6297(a)(1) thus indicates that its preemptive effect depends upon the nature of the information required to be disclosed, not on the purposes for which disclosure is required. Standing alone, a product marking that identifies the manufacturer, model number, and date of manufacture of a covered appliance communicates nothing about the amount of energy or water that will be consumed in the product's operation. The data mandated by Cal. Code Regs. tit. 20, § 1607(b) and (c) therefore do not constitute "information with respect to any measure of energy consumption or water use."

3. The final state regulatory provision at issue here requires that energy-performance information be marked on

certain industrial and commercial appliances for which no federal labeling requirements exist. See Cal. Code Regs. tit. 20, § 1607(d)(2); Pet. App. 17a. The court of appeals held that those state regulatory provisions are not preempted because, there being no federal labeling requirement in effect for those products, the California regulatory scheme "does not require the disclosure of information that is 'other than information required' under federal law." *Id.* at 16a. Petitioners challenge that holding, contending (Pet. 19) that because the federal labeling regulations do not yet require any information concerning those appliances to be disclosed, the state requirement necessarily mandates a "disclosure of information" that is "other than information required" by the EPCA. See Pet. App. 22a (Noonan, J., dissenting) ("Where there are no federal regulations on the subject because the DOE has not promulgated any regulations, then any state regulations are 'other than' those federally required."). Moreover, Congress's deletion in 1987 of statutory language that had unambiguously limited Section 6297(a)(1)'s preemptive effect to situations in which a federal labeling rule existed (see pp. 10-11, *supra*) might suggest that no such limitation was intended.

There is some force to those points. On the other hand, Section 6297(a)(1)(B)'s reference to information "other than information required under" federal law might be read as making the existence of an applicable federal regulation under which disclosure of information in labeling *is* required a precondition for preemption to be triggered for the particular product, and as manifesting Congress's intent that state law will be preempted only when such regulations exist. In any event, this aspect of the Ninth Circuit's decision does not warrant further review. Petitioners identify no other judicial decision that has construed 42 U.S.C. 6297(a)(1), let alone a decision that has applied Section 6297(a)(1) to appliances for which no federal labeling rule exists. And because petitioners

identify no other State that has adopted regulations comparable to Cal. Code Regs. tit. 20, § 1607(d)(2), the court of appeals' ruling does not oblige petitioners to comply with inconsistent marking requirements in different parts of the country. There is consequently no sound reason to regard the narrow question presented here as an issue of substantial legal or practical importance.

Until the EPCA's amendment by the NAECA in 1987, the preemptive effect of Section 6297(a)(1) was unambiguously limited to covered products for which a federal labeling rule existed. See pp. 10-11, 13, *supra*. Whatever the impact of the 1987 amendment on the ultimate preemption question, there is no suggestion in the legislative history that the amendment responded to significant practical concerns. To the contrary, the 1987 Senate Report blandly described the amended version of Section 6297(a)(1) as "essentially restat[ing] existing law." S. Rep. No. 6, *supra*, at 9; see p. 11, *supra*. Even assuming, *arguendo*, that the actual effect (whether intended or unintended) of the NAECA amendments was to expand Section 6297(a)(1)'s preemptive scope to encompass appliances for which no federal labeling rule has been promulgated, the background of that modification reinforces the conclusion that the application of Cal. Code Regs. tit. 20, § 1607(d)(2) does not present a question of such substantial importance as to merit the Court's review.

B. The Court Of Appeals' Decision Is Consistent With *Engine Manufacturers Association* v. *South Coast Air Quality Management District*, 541 U.S. 246 (2004)

Contrary to petitioners' contention (Pet. 11-14), the court of appeals' ruling in this case does not conflict with this Court's recent decision in *Engine Manufacturers Ass'n* v. *South Coast Air Quality Management District*, 541 U.S. 246 (2004) (*EMA*). The federal statute that was given preemptive

effect in *EMA*, and the state-law requirements that were found to be preempted, are wholly distinct from the federal and state laws at issue here. Far from being "indistinguishable" (Pet. 13), the two cases have little in common beyond the facts that both arose in the Ninth Circuit and that both involved the construction of express preemption provisions.

Petitioners contend (Pet. 11, 13) that the manner in which the court of appeals applied a presumption against preemption reflected an "interpretive methodology" that this Court in *EMA* rejected. This Court in *EMA*, however, did not either invoke or reject a presumption against preemption or embrace any particular articulation of such a presumption; it simply held that, in light of the clarity of the relevant statutory text, the determination whether such a presumption applied would "demonstrably make[] no difference to resolution of the principal question" in the case. 541 U.S. at 256. Nor was the court of appeals' methodology in this case inconsistent with *EMA* in other respects. To the contrary, the court below carefully analyzed the relevant EPCA language, noting, inter alia, that the phrase "disclosure of information" should be given the same meaning in different parts of the statute. Pet. App. 7a-8a. The Ninth Circuit's reliance on that interpretive principle was fully consistent with *EMA*, in which this Court observed that the meaning of the term "standard" in the preemption provision of the Clean Air Act (CAA) was elucidated by "Congress's use of the term in another portion of the CAA." 541 U.S. at 254.

C. The Court Of Appeals' Application Of A Presumption Against Preemption Of State Law Raises No Issue That Independently Warrants This Court's Review

Petitioners urge this Court to grant review to clarify the circumstances under which courts should apply a presumption

against preemption of state law. See Pet. 14-21. That claim is misconceived.

1. As petitioners recognize, this Court's decisions make clear that a presumption against preemption (i) applies in "a field which the States have traditionally occupied," Pet. 14 (quoting *Buckman Co.* v. *Plaintiffs' Legal Comm.*, 531 U.S. 341, 347 (2001)), and (ii) does not apply "when the State regulates in an area where there has been a history of significant federal presence," Pet. 15 (quoting *United States* v. *Locke*, 529 U.S. 89, 108 (2000)). Thus, despite petitioners' extravagant assertion (Reply Br. 3 n.1) that the question presented here "potentially governs the preemptive effect of every federal statute," the ultimate thrust of petitioners' argument is much more modest. Petitioners' core contention is that review is warranted to consider the applicability of a presumption against preemption when Congress legislates in a field that has not traditionally been regulated *either* by the federal government *or* by the States.

In the first place, it is not clear that abstract differences in the formulation or application of a presumption against preemption would justify plenary review in the absence of a concrete split in authority on the preemptive force of a particular statute. This Court has generally made its statements about a presumption for or against preemption—much as it has made statements about other principles of statutory construction—in the context of cases that independently merited the Court's review. When the lower courts have disagreed about the preemptive force of a particular federal statute, that disagreement may provide a basis for clarifying the relevant presumption in a concrete context in which courts have come to differing conclusions. But any difference between the formulation of the presumption in one setting and its articulation in a discrete statutory context does not merit the Court's review.

2. Even assuming, *arguendo*, that the EPCA operates in a field that has traditionally been free from both state and federal regulation (compare Pet. 15 with Br. in Opp. 7), the question of what presumption applies in that context does not merit this Court's review. A number of the Court's decisions have treated a tradition of state regulation in the relevant field as a factor warranting a presumption against preemption. See, *e.g.*, *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 485 (1996). The Court has not held, however, that the absence of such a tradition would necessarily render such a presumption inappropriate.

Since issuing its decision in *Medtronic*, this Court has identified two related settings in which there is no presumption against preemption. The first consists of areas, such as the regulation of national and international maritime commerce, "where there has been a history of significant federal presence." *Locke*, 529 U.S. at 108. The second involves state attempts to police the "relationship between a federal agency and the entity it regulates." *Buckman*, 531 U.S. at 347 (finding state-law claim for fraud on the Food and Drug Administration to be preempted). The instant case does not involve either of those situations.

This Court's refusal to apply a presumption against preemption when States regulate matters that are "inherently federal in character" (*Buckman*, 531 U.S. at 347) does not necessarily suggest that there is no such presumption in fields lacking any tradition of state *or* federal regulation. Most significantly, petitioners identify *no* case in which the Court has declined to apply a presumption against preemption solely on the ground that the relevant sphere of conduct had not traditionally been regulated by the States. Absent any decision by this Court actually adopting the rule that petitioners advocate, there is no basis for petitioners' contention that the

court of appeals' reliance on a presumption against preemption conflicts with the Court's precedents.

3. Petitioners' claim of a circuit conflict is mistaken for essentially the same reason. The court of appeals decisions on which petitioners rely fall into two basic categories. Some of those decisions hold, in accordance with this Court's decision in *Locke*, that a presumption against preemption does not apply in an area where there has been a history of significant federal presence.[5] Because petitioners do not contend that the instant case implicates a longstanding tradition of federal regulation, those decisions are inapposite.

Other decisions cited by petitioners simply apply a presumption against preemption in areas traditionally regulated by the States.[6] Contrary to petitioners' suggestions (Pet. 16;

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[5] See *UPS, Inc.* v. *Flores-Galarza*, 318 F.3d 323, 336 (1st Cir. 2003) ("No presumption against preemption is appropriate in this case because of Congress's significant—and undisputed—presence in the field of air transportation."); *Wachovia Bank, N.A.* v. *Burke*, 414 F.3d 305, 314 (2d Cir. 2005) (declining to apply a presumption against preemption in case involving federally chartered banks on the ground that regulation of such banks has historically been the province of the federal government), petition for cert. pending, No. 05-431 (filed Sept. 30, 2005); *Forest Park II* v. *Hadley*, 336 F.3d 724, 728-730, 732 (8th Cir. 2003) (detailing the decades-long history of federal affordable-housing loans and declining to apply a presumption against preemption to a state law that purportedly "regulate[d] or restrict[ed] the actions of the federal government under its own federal program" with respect to such a loan).

[6] See *Cliff* v. *Payco General Am. Credits, Inc.*, 363 F.3d 1113, 1125 (11th Cir. 2004) (applying a presumption against preemption to a state law involving consumer protection, "a field traditionally regulated by the states"); *Massachusetts* v. *United States Dep't of Transp.*, 93 F.3d 890, 894 (D.C. Cir. 1996) (applying a presumption against preemption to a state law regulating "how waste may be picked up or dropped off in a state," which "must be thought an area of traditional state control"); *Bronco Wine Co.* v. *Jolly*, 95 P.3d 422, 429 (Cal. 2004) ("After extensively reviewing the history of state regulation of beverage and wine labels prior to Congress's adoption of the FAA Act in 1935—a history that reveals substantial state involvement and

Reply Br. 4), the appellate courts' consistent recognition that a tradition of state regulation *supports* application of a presumption against preemption does not logically imply that such a tradition is a *necessary* condition for applying such a presumption.[7] Because petitioners identify no case in which a court of appeals has declined to apply a presumption against preemption based solely on the absence of a longstanding state regulatory presence in the relevant field, petitioners' claim of a circuit conflict is unfounded.

Moreover, as explained above (see pp. 6-14, *supra*), the court of appeals' decision concerning the preemptive scope of Section 6297(a)(1) does not warrant review. This case therefore would not in any event be an appropriate vehicle for considering any variation in the formulation or application of a presumption against preemption in different settings.

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very little federal regulation—we conclude that a presumption against preemption does indeed apply in this case."), cert. denied, 544 U.S. 922 (2005).

[7] In *UPS*, the First Circuit stated in dictum that a presumption against preemption "only arises * * * if Congress legislates in a field traditionally occupied by the states." 318 F.3d at 336. The First Circuit further explained, however, that "[n]o presumption against preemption is appropriate in this case because of Congress's significant—and undisputed— presence in the field of air transportation." *Ibid.* That rationale is fully consistent with the court of appeals' decision in the instant case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In the
Supreme Court of the United States

AIR CONDITIONING & REFRIGERATION INSTITUTE *et al.*,
Petitioners,

v.

ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR ALLIANCE OF AUTOMOBILE MANUFACTURERS, AMERICAN PETROLEUM INSTITUTE, ASSOCIATION OF INTERNATIONAL AUTOMOBILE MANUFACTURERS, ENGINE MANUFACTURERS ASSOCIATION, NATIONAL ASSOCIATION OF MANUFACTURERS, AND THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR CERTIORARI

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QUESTION PRESENTED

The Energy Policy and Conservation Act of 1975, as amended, sets energy and water-use efficiency standards for appliances, and expressly preempts "any State regulation [that] provides at any time for the disclosure of information with respect to any measure of energy consumption or water use" that differ from federal requirements. 42 U.S.C. §§ 6297, 6316. Applying an unprecedented form of the presumption against preemption, the Ninth Circuit held in this case that California regulations requiring detailed energy-information disclosures by manufacturers to state regulators are not preempted because such disclosures are not "directed to consumers at point of sale or use."

The question presented is whether the Ninth Circuit correctly applied the presumption against preemption in letting stand California's strategic attempt to nullify Congress's express preemption of state-disclosure requirements.

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INTEREST OF *AMICI CURIAE*[1]

Amici and their members represent an array of industries that manufacture and market products for sale in the global marketplace. Because *amici* and their members are regulated under the Energy Policy and Conservation Act of 1975 ("EPCA"), Pub. L. No. 94-163 (1975), they have a direct interest in the issues raised here concerning the proper scope and effect of the EPCA's express preemption provisions. They also have a general interest in the interpretation and application of federal statutes establishing uniform regulation and in determining the proper relationship of those statutes to state laws and regulations applied to the same matters. *Amici* believe that California's burdensome disclosure requirements are squarely inconsistent with the federal scheme established by Congress providing for uniform, national regulation of energy-consuming products sold nationwide. They also believe that the Ninth Circuit's decision misapplies the presumption against preemption, is not faithful to the plain language of the EPCA's express preemption provisions, and is directly in conflict with this Court's settled precedents.

ALLIANCE OF AUTOMOBILE MANUFACTURERS. The Alliance of Automobile Manufacturers, Inc. is a non-profit trade association comprised of nine car and light truck manufacturers. The Alliance has no parent company, subsidiaries, or affiliates that have issued shares to the public.

AMERICAN PETROLEUM INSTITUTE. The American Petroleum Institution is a non-profit national trade association for the U.S. oil and natural gas industry. API's

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[1] Both petitioners and respondents have consented to the filing of this brief in letters that are on file in the Clerk's office. Pursuant to S. Ct. R. 37.6, *amici* state that no counsel for a party authored any part of this brief, and no person or entity other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

more than 400 member companies are engaged in all aspects of the oil and natural gas industry, including exploration, production, transportation, refining, distribution and marketing. API has no parent company, subsidiaries, or affiliates that have issued shares to the public.

ASSOCIATION OF INTERNATIONAL AUTOMOBILE MANUFACTURERS. The Association of International Automobile Manufacturers is a non-profit trade association representing international manufacturers and distributors of motor vehicles. AIAM has no parent company, subsidiaries, or affiliates that have issued shares to the public.

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA. The Chamber of Commerce is the world's largest business federation, representing an underlying membership of more than three million businesses, state and local chambers of commerce, and professional organizations. Chamber members operate in every sector of the economy and transact business throughout the United States. The Chamber has participated as *amicus curiae* in several hundred cases before this Court, including numerous cases addressing the subject of federal preemption.

ENGINE MANUFACTURERS ASSOCIATION. The Engine Manufacturers Association is a not-for-profit trade association that represents the leading manufacturers of internal combustion engines used in most medium-duty and heavy-duty vehicles, as well as in marine vessels, locomotives, and lawn, garden and utility equipment. EMA has no corporate parents, subsidiaries, or affiliates, and no publicly traded company has a ten percent or greater ownership interest in EMA.

NATIONAL ASSOCIATION OF MANUFACTURERS. The National Association of Manufacturers is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 States. NAM's mission is to enhance the competitiveness of

manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media, and the general public about the vital role of manufacturing to America's economic future and living standards. NAM has no parent company, subsidiaries, or affiliates that have issued shares to the public.

INTRODUCTION

Congress has enacted comprehensive federal legislation governing energy efficiency standards for appliances and industrial equipment. In so doing, the Article I branch has expressed its specific intent to displace state law. The Energy Policy and Conservation Act, as amended, contains express preemption provisions that preempt "*any* State regulation [that] ... provides *at any time* for the disclosure of information with respect to *any* measure of energy consumption or water use" that differ from federal requirements. 42 U.S.C. § 6297(a)(1) (emphasis added); *see id.* § 6316. The preemption provisions are broadly framed, for Congress recognized that a successful national energy efficiency policy required that it "protect the appliance industry from having to comply with a patchwork of numerous conflicting State requirements," H.R. Rep. No. 100-11, at 24, and "bring a degree of regulatory ... certainty to the business planning of the appliance industry." *Id.* at 28.

California nonetheless seeks to nullify Congress's express preemption provisions and impose its own set of energy efficiency disclosure requirements on American businesses. Specifically, California has promulgated regulations that ban federally covered appliances from sale in the State unless manufacturers disclose extensive, detailed energy-efficiency information to California regulators. *See* Cal. Code Regs. Tit. 20 §§ 1606-1608 (2005). Likewise, the regulations mandate the inclusion of labels and other markings on appliances sold in California not required under

federal law. *See id.* § 1607. In briefing below, California emphasized its view that state-mandated disclosures, beyond those required by federal law, are "essential to the goal of saving energy." Appellants' Opening Br. 8-9. And it noted that the information collected by California regulators is "used daily by ... government agencies, consumers, building officials, energy researchers, utility program managers, manufacturers, and even other major appliance databases." *Id.*

As Judge Noonan explained in his dissent below, California's regulations are precisely the type of state regulations that Congress intended to prohibit under the EPCA's express preemption provisions. *See* Pet. App. 21a. The Ninth Circuit panel majority, however, reached the opposite result. Emphasizing California's view that its regulations serve "laudable" goals, the court employed an unprecedented "presumption against preemption" as justification for rewriting the plain text that Congress crafted. In particular, the panel majority narrowly construed the EPCA's preemptive scope, holding that the words "disclosure of information" refer only to "consumer-directed labeling at point of sale or use." Pet. App. 12a. And it imposed other strained narrowing constructions in order to save California's regulatory scheme.

For reasons set forth below, the Ninth Circuit manifestly erred in letting stand California's strategic regulatory attempt to nullify the EPCA's command that the States may not interfere with the uniform federal regulatory scheme governing energy efficiency disclosures. This Court should not tolerate this affront to federal law.

REASONS FOR GRANTING THE WRIT

The Court should grant *certiorari* for at least three reasons. *First*, the decision below contravenes this Court's prior decisions and cannot be squared with fundamental principles lying at the heart of federal preemption jurisprudence. (*See* Section A, below.) *Second*, the question presented addresses an important, recurring issue of federal law over which there is substantial confusion among the courts of appeals—namely, what role (if any) is there for a "presumption against preemption" when Congress expressly preempts state law in an area that has *not* been traditionally regulated by the States. (*See* Section B, below.) *Third*, this case raises a question of exceptional importance. If not reversed, the decision below threatens to undermine Congress's ability to deal effectively with new and emerging regulatory challenges of national importance, and protect federal statutory regimes from encroachment by the States. (*See* Section C, below.)

A. The Decision Below Conflicts With This Court's Prior Decisions.

The Court should grant the petition because the Ninth Circuit's ruling directly conflicts with this Court's prior decisions.

Time and again this Court has emphasized that where, as here, Congress expressly indicates its intent to displace state law with uniform federal regulation, courts asked to determine the preemptive scope of federal legislation "must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Engine Mfrs. Ass'n v. South Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252 (2004) ("*EMA*") (internal quotation omitted). This Court has accordingly held that if a statute "contains an express preemption clause, [the] 'task of statutory construction must *in the first instance* focus on the plain wording of the clause,

which necessarily contains the best evidence of Congress's preemptive intent.'" *Sprietsma v. Mercury Marine*, 537 U.S. 51, 62-63 (2002) (quoting *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993) (emphasis added)); *see also Wisconsin Dep't of Revenue v. William Wrigley, Jr., Co.*, 505 U.S. 214, 224 (1992) (a court's task "is simply to ascertain the fair meaning" of terms employed by Congress).

It is therefore dispositive that Congress has emphatically and expressly preempted "any" state disclosure requirements, such as California's, that exceed the information disclosures called for under federal testing and labeling programs. *See* 42 U.S.C. § 6293 (testing); *id.* § 6294 (labeling). State laws mandating the disclosure of energy efficiency information are preempted under the EPCA if they require "testing" or mere "use" in "any manner other than" what is required under federal law, or if they require "disclosure of information" "other than" the information that must be disclosed under federal law. *See id.* § 6297(a)(1). As petitioners explain, it is undisputed that California's regulations require manufacturers to disclose information not required under the federal regime. *See* Pet. 12.

Apart from unpersuasive nods toward statutory interpretation, the Ninth Circuit did not attempt to discern the plain meaning of the EPCA's express preemption provisions. It instead accepted California's invitation to apply an unprecedented presumption against preemption; construed the EPCA's preemption provisions "narrowly" (as it emphasized more than a dozen times); and read artificial limitations into the statute's otherwise unconditional terms. *See* Pet. App. at 4a, 7a, 8a & n.5, 12a, 14a. Specifically, the court below saved California's disclosure requirements by narrowly construing section 6297(a)(1)'s reference to "disclosure of information" as referring only to "consumer-directed labeling at point of sale or use." Pet. App. 12a. But no such qualifier appears in section 6297(a)(1). Nor does the panel's interpretation make sense. Congress expressly

sought to preempt differing disclosure requirements with respect to state testing or other state "uses" in section 6297(a)(1), actions that are disclosures to state regulators and not disclosures to consumers at the point of sale. Section 6297(a)(1) thus preempts state-mandated disclosures—to state regulators, to consumers, or to anyone else—that are not required under either the federal testing program, *see* 42 U.S.C. § 6297(a)(1)(A), or the federal labeling program, *see id.* § 6297(a)(1)(B).

The Ninth Circuit's anti-textual invocation of the presumption against preemption runs contrary to this Court's precedents. The presumption is a judicial tool for avoiding "*unintended* encroachment on the authority of the States." *CSX Transp.*, 507 U.S. at 664 (emphasis added). It does not apply where, as here, Congress's intent to preempt is manifest. *See United States v. Locke*, 529 U.S. 89, 107-08 (2000). As petitioners emphasize, the presumption may not be employed to "read [limitations] into the unconditional words of [a] statute." *EMA*, 541 U.S. at 256; *see also* Pet. 11-14. No matter how much a particular matter may fall within traditional state regulatory purview, when Congress properly exercises its enumerated powers the States are duty bound to respect those federally ordained enactments. *See* U.S. Const. art. VI cl. 2; *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 108 (1992) ("under the Supremacy Clause, from which our pre-emption doctrine is derived, any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield") (internal quotations omitted). "The relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that federal law must prevail." *Free v. Bland*, 369 U.S. 663, 666 (1962); *Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1, 210-11 (1824).

To be sure, this Court's members have disagreed at times over the weight (if any) to be afforded the presumption when

Congress regulates in areas traditionally governed by the States. *See, e.g., Bates v. Dow Agrosciences LLC*, 125 S. Ct. 1788, 1805 (2005) (Thomas, J., concurring in the judgment in part and dissenting in part); *Cippolone v. Liggett Group, Inc.*, 505 U.S. 505, 544 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part). But the Court has never held that the presumption should apply where, as here, Congress regulates in areas that the States have *not* traditionally occupied. *See, e.g., Buckman Co. v. Plaintiffs Legal Committee*, 531 U.S. 341, 347-48 (2001) (because "[p]olicing fraud against federal agencies is hardly a field which the States have traditionally occupied," there is no "warrant [for applying] a presumption against finding federal pre-emption of a state-law cause of action") (internal quotation omitted). The structural interest in preserving States' regulatory powers is not implicated when the state regulatory activity falls outside a field traditionally occupied by state authority.

Oddly, the Ninth Circuit majority never paused to consider the history of state regulation in the area of appliance efficiency disclosures. Instead, the panel boldly presumed that Congress could not have meant what it said, because it discerned "no history of [a] significant federal presence." Pet. App. 4a.

Had the Ninth Circuit undertaken the proper analysis, it would have recognized that Congress adopted the EPCA in 1975 precisely because there had been no significant regulation of energy efficiency, leaving the United States vulnerable to the then-recent Arab oil embargo. *See Natural Res. Def. Council, Inc. v. Harrington*, 768 F.2d 1355, 1364 (D.C. Cir. 1985). It also would have been forced to confront the fact that California's efficiency program, which began two years *after* Congress passed the EPCA, cannot possibly establish that the States in general have "traditionally" been involved in the regulation of energy efficiency information. *Cf.* Pet. App. 22a (Noonan, J., dissenting) ("California is not

big enough alone single-handedly to generate" the presumption). In short, there is no history of state regulation that could justify applying a presumption against preemption.

B. There Is Confusion Among The Courts Of Appeals Over When The Presumption Against Preemption Should Apply.

The direct conflict between the Ninth Circuit's decision and this Court's prior decisions is emblematic of the differing preemption approaches confusingly embraced by the courts of appeals. Widespread uncertainty reigns over what conditions trigger the presumption—namely, whether the presumption applies only when the federal government seeks to supplant state law in areas of local concern historically regulated by the States (as some courts have concluded); or whether it applies in every preemption case (as other courts have suggested); or whether it applies whenever there is an absence of longstanding federal regulation (as the Ninth Circuit has held). This case presents an ideal opportunity to bring clarity to this important area of federal law.

Several courts have recognized that the presumption applies only when the federal government asserts its authority over traditional state prerogatives. *See* Pet. 16 (noting that the First, Second, Eighth, Eleventh, and D.C. Circuits have taken this approach). These courts have held that the presumption is not triggered in fields of regulation substantially occupied by federal authority. *See, e.g.*, *Flagg v. Yonkers Sav. & Loan Ass'n*, 396 F.3d 178, 183 (2d Cir. 2005); *United Parcel Service, Inc. v. Flores-Galarza*, 318 F.3d 323, 336 (1st Cir. 2003). They also have recognized that when Congress legislates in an area of national concern with no history of state regulation, no room remains for presumptions against the supremacy of federal law. *See, e.g.*, *Forest Park II v. Hadley*, 336 F.3d 724, 731 (8th Cir. 2003) ("unlike cases involving a field traditionally regulated by the states, there is no presumption against preemption in this case"); *BankWest, Inc. v. Baker*, 411 F.3d 1289, 1303 (11th

Cir. 2005) (noting that the presumption against preemption only applies "[i]n such situations" where Congress regulates in areas traditionally occupied by the States). The presumption "*only* arises ... if Congress legislates in a field traditionally occupied by the States." *United Parcel Service*, 318 F.3d at 336 (emphasis added).

In contrast, other courts have suggested that the presumption categorically applies in *all* preemption cases. *See* Pet. 16 (noting that the Fourth, Seventh, and Ninth Circuits have taken this approach). These courts have held that preemption analysis should "*always* start[] with the presumption that Congress did not intend to supplant state law." *Saul v. United States*, 928 F.2d 829, 840 (9th Cir. 1991) (internal quotation omitted); *Frank Bros., Inc. v. Wisconsin Dep't of Transp.*, 409 F.3d 880, 885 (7th Cir. 2005) ("we presume that, *in all circumstances*, Congress does not intend to supplant state law") (emphasis added). Significantly, however, even these pro-presumption courts have not gone as far as the court below. The Seventh Circuit has noted, for instance, that the presumption is readily "overcome" when there is a "clear declaration of intent to preempt state law." *Lynbrook Farms v. Smithkline Beecham Corp.*, 79 F.3d 620, 627 (7th Cir. 1996). Likewise, the Fourth Circuit has recognized that, although courts begin with a presumption that "'Congress does not intend to supplant state law,'" when "Congress expresses its intention clearly to do so through its constitutionally appointed legislative power, the Supremacy Clause establishes that federal law supersedes state law that either directly, by implication, or by express provision conflicts with federal law." *Metropolitan Ins. Co. v. Pettit*, 164 F.3d 857, 861 (4th Cir. 1998) (citation omitted).

Finally, in certain cases, as in this one, the Ninth Circuit has tacked in a radically different direction, holding that "a presumption against federal preemption" always applies "unless the state attempts to regulate an area in which there is

a history of significant federal regulation." *Gadda v. Ashcroft*, 377 F.3d 934, 944 (9th Cir. 2004); *see also Public Util. Dist. No. 1 of Grays Harbor Cty. Wash. v. IDACORP, Inc.*, 379 F.3d 641, 647 n.7 (9th Cir. 2004). The Ninth Circuit has thus transformed the background assumption that Congress proceeds cautiously when legislating in areas traditionally governed by the States into a general presumption in any area where the federal government has previously not been involved.

Further examples could be adduced, but the fundamental point is clear: Confusion abounds among the courts of appeals over the proper approach to applying the presumption against preemption. Because this confusion reflects lingering uncertainties in this Court's preemption jurisprudence, *certiorari* is warranted.

C. The Question Presented Is A Recurring One Of Exceptional Public Importance.

Certiorari is also warranted because the question presented is one of significant practical importance. If left uncorrected, the Ninth Circuit's unprecedented application of the presumption—requiring narrow constructions of express preemption provisions whenever there is an absence of prior federal regulation—opens the door for States to encroach on federal prerogatives and interfere with Congress's efforts to protect American businesses and consumers through uniform national regulation.

As petitioners explain, the Ninth Circuit's failure to strike down California's regulatory scheme will inevitably undermine Congress's national energy policy and undo the careful tradeoff Congress made between increased federal regulation and burdensome requirements imposed by each of the 50 States. *See* Pet. 21-24. Although Congress imposed stringent federal requirements, it expressly preempted state law in order "to protect the appliance industry from having to comply with a patchwork of numerous conflicting State

requirements," H.R. Rep. No. 100-11, at 24, and to "bring a degree of regulatory ... certainty to the business planning of the appliance industry," *id.* at 28. California's regulations fatally undermine that purpose. If the Ninth Circuit's decision is not reversed, the nation's energy efficiency policy for appliances will be seriously undermined. *See* Pet. 23-24. California will have free rein to interfere with federal regulatory goals, and its regulations will dramatically increase the burdens on businesses and the costs to consumers.

In addition, the Ninth Circuit's decision will have broader pernicious effects:

First, the Ninth Circuit's approach threatens to turn every express preemption case into an implied preemption case. The rule below invites courts to engage in largely standardless inquiries skewed by "presumptions" that run contrary to Congress's expressed intent. *See* Pet. App. 12a ("the legislative history [contains] no indication that Congress ... intended to preempt state regulations requiring the submission of data to state government agencies"). Under the Ninth Circuit's vision, a court's task will no longer be "an easy one" when "Congress makes its intent [to preempt] known through explicit statutory language." *English v. General Elec. Co.*, 496 U.S. 72, 79 (1990). Instead, express preemption clauses may well become superfluous. *See, e.g.*, Michael K. Carrier, *Federal Preemption of Common Law Tort Awards By The Federal Food, Drug, and Cosmetic Act*, 51 FOOD & DRUG L.J. 509, 546 (1996) (explaining that express preemption must be "different from implied preemption, otherwise a preemption clause would be superfluous").

Second, by applying a presumption against preemption whenever Congress seeks to implement a uniform national policy for the first time, the Ninth Circuit makes it problematic for Congress to respond effectively to emerging regulatory challenges. If courts strain to "narrowly

interpret"—or, as here, actually rewrite—the terms of express preemption provisions, then any federal response to emerging events will be uncertain, delayed by litigation, and subject to encroachment by the States.

Numerous emerging regulatory areas of national concern exist where Congress may ultimately decide to proscribe state regulatory activity. For instance, Congress is considering legislation that would preempt state and local government interference with interstate commerce on the Internet or interactive computer services. *See* S. 442, 105th Cong. (1998); H.R. 1684, 109th Cong. (2005). Similarly, Congress has recently considered human cloning legislation that would preempt any state or local law establishing "prohibitions, requirements, or authorizations regarding human somatic cell nuclear transfer technology that are different than, or in addition to, those" established under federal law. H.R. 2172, 107th Cong. (2001). Neither bill has yet been enacted. Nonetheless, if Congress were to pass such legislation, the fact that "there is no history of significant federal presence" in these emerging areas of national concern should not give rise to a presumption against preemption. As this Court has recognized in other contexts, absurd results would flow if federal regulations of "recent vintage" were given less weight simply because they are applied in new or emerging industries. *Cf. Donovan v. Dewey*, 452 U.S. 594, 606 (1981) (recognizing that the duration of a federal scheme cannot be the only test for determining whether federal regulation is pervasive).

Third, and perhaps most troubling, the Ninth Circuit's anti-textual approach opens the door for States to employ strategic regulation to undermine existing federal schemes. It bears emphasis that it is virtually impossible for Congress to draft precise preemption provisions that anticipate what activity the 50 States might take to interfere with federal policies. Because no law can anticipate all contingencies, it will always be possible for States, like California, to invoke

distinctions that Congress could not possibly foresee and then use those distinctions to nullify express preemption provisions no matter how broadly they are framed. *See* Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 290-91 (2000) (noting that "the presumption has taken on a life of its own, and is now being applied even to federal statutory provisions that plainly do manifest an 'inten[t] to supplant state law'"); Viet D. Dinh, *Reassessing the Law of Preemption*, 88 GEO. L.J. 2085, 2092 (2000) (noting that misuse of presumptions allows courts to "rewrite the laws enacted by Congress [and] disrupt the constitutional division of power between federal and state governments").

Indeed, in almost any context where Congress has expressly preempted state law, it is possible to conjure up "laudable" sub-classes of activity carved from the scope of an express preemption provision. In *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001), for instance, Massachusetts argued that state regulations governing outdoor and point-of-sale advertising for cigarettes were not preempted by the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. § 1334(b), because they governed the location, not the content, of advertising. *See id.* at 549. This Bay State creativity met with disfavor in this Court, which noted that the content/language distinction could not be reconciled with the statute's broadly worded preemption provision. Indeed, such an approach would allow the States to undermine the federal regulatory scheme. *See id*; *see also EMA*, 541 U.S. at 252 (rejecting California's attempt to advance the laudable goal of improving air quality by asserting that federal preemption of state and local emission standards covered only those standards relating to the sale, not the purchase, of new motor vehicles); *Norfolk S. Ry. Co. v. Shanklin*, 529 U.S. 344, 355 (2000) (refusing to read the Federal Railroad Safety Act's express preemption provision narrowly in order to save state tort actions); *cf. Walker v. Armco Steel Corp.*, 446 U.S. 740, 750 n.9 (1980) (rejecting the suggestion that "the

Federal Rules of Civil Procedure are to be narrowly construed in order to avoid a 'direct collision' with state law"). Under the Ninth Circuit's logic, however, this Court should have employed a presumption against preemption, narrowly interpreted the federal statute in favor of state law, and turned a blind eye to Congress's expressed intent to preempt.

Amici and their members are concerned that the Ninth Circuit's novel approach to preemption will allow States to circumvent the plain language of express preemption provisions. In a wide variety of contexts, Congress has implemented uniform regulations and expressly preempted state law, recognizing that experimentation among the States is not always in the best interest of American businesses and consumers. In particular, Congress has sought in certain areas of national concern to avoid the wasteful inefficiencies and costs to consumers that would otherwise result if businesses that sell goods and services in interstate commerce were required to comply with a "patchwork" of 50 differing state regulations. *See, e.g.* 29 U.S.C. § 1144(a) (expressly preempting state laws relating to employee benefit plans); 42 U.S.C. § 5403(d) (expressly preempting state "manufactured home construction and safety standard[s]"); 47 U.S.C. § 332(c)(3)(A) (expressly preempting state laws attempting "to regulate the entry of or the rates charged by any commercial mobile service"); 49 U.S.C. § 20106 (expressly preempting state laws relating to areas of railroad security already regulated by either the Secretary of Transportation or the Secretary of Homeland Security); 49 U.S.C. § 30103(b) (expressly preempting state motor vehicle safety standards that are different than federal standards); 49 U.S.C. § 41713(b)(4)(A) (expressly preempting state laws relating "to a price, route, or service" of air carriers). In such contexts, uniform federal regulation has formed a solid foundation for the product and regulatory compliance planning of *amici* and their members. *Amici* and their

members, as well as American consumers in general, would suffer substantial harm—potentially to the tune of hundreds of millions, if not billions, of dollars—if States could effectively nullify express preemption provisions by invoking clever distinctions and urging courts to rewrite plain statutory text in service of a presumption against preemption.

Finally, the Ninth Circuit's approach necessarily risks allowing States to undo the "somewhat delicate balance between statutory objectives" struck by the federal government. *Buckman*, 531 U.S. at 348. The Ninth Circuit's approach, which invites courts to disregard the natural meaning of express preemption provisions whenever state regulations serve "laudable" goals, Pet. App. 2a, creates precisely the uncertainty, costs, and even risks to safety that Congress sought to avoid when it called for uniform, federal regulation. As this Court has recognized, "[d]eciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law." *Rodriguez v. United States*, 480 U.S. 522, 528 (1987) (emphasis omitted). Where, as here, Congress paints over state and local laws with a broad preemptive brush, such provisions should be interpreted to protect and implement federal statutory regimes from encroachment by the States.

CONCLUSION

For the foregoing reasons, and for reasons set forth in the petition, the Court should grant the writ of *certiorari*.

Respectfully submitted,

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